A Background Paper

The Legal Response to Sexual Abuse of Children

A review of current procedural and legal practices in the child welfare and criminal justice systems

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Prepared for
The Metropolitan Chairman's Special Committee on Child Abuse October 1982

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THE LEGAL RESPONSE TO SEXUAL ABUSE OF CHILDREN

A background paper reviewing current procedural and legal practices in the child welfare and criminal justice systems regarding child sexual abuse.

Prepared for

The Metropolitan Chairman's Special Committee on Child Abuse

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October 1982

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FOREWORD

Background

The Special Committee on Child Abuse, established by Metropolitan Chairman Paul Godfrey and formally convened in October 1981, is committed to reducing the incidence of child abuse in Metro Toronto through co-ordinated action to improve detection, reporting, investigation and treatment of abusing families. Specifically, the first priority of the Special Committee is the development of a co-ordinated program to combat the sexual abuse of children.

Membership on the Special Committee includes senior representatives of the Children's Aid Societies, Police, Health, Education, and the Metropolitan and Provincial Governments (see Appendix K). The initial two-year project, jointly funded by Metropolitan Council and the Ministry of Community and Social Services, will be reviewed in October 1983.

During the past decade, many important initiatives have been undertaken on behalf of physically abused children. Only recently, however, has it been recognized that the problem of sexual abuse is likely equally prevalent. Reliable estimates suggest that as many as one in four girls and one in ten boys will be sexually abused by an adult at some time before the age of 18. Eighty per cent of these children will know their molester and, half the time, he will be a family member, probably their own father.

The experience in Metropolitan Toronto, however, does not reflect a comprehensive understanding of or response to this extremely difficult and serious problem. The Special Committee, therefore, has concentrated its efforts in four main areas in an attempt to support the evolution of a common approach to helping child victims of sexual abuse and their families. These include initiatives in the following areas: investigation/protection/prosecution; crisis support/treatment; prevention/detection; and training.

Child Sexual Abuse: A Focus for Action

During its first year, the Special Committee undertook a variety of activities designed to support the design and implementation of a comprehensive response to child sexual abuse. These included extensive consultation, literature reviews, inter-disciplinary training of fifteen professionals at treatment institutes in the United States, development of an advisory/action group of women who were sexually abused as children, formation of a legal advisory committee, and development of proposals for crisis support groups as well as a project to assist in early detection and prevention of child sexual abuse.

The results of these activities led to the development of a statement of principles (Appendix L) and an action plan for the next year which were approved by the Special Committee at a meeting on November 3, 1982. In moving toward an integrated, co-ordinated program to address the problem of child sexual abuse, the Special Committee will implement a number of initiatives by October 1983. These include:

- development of an integrated protocol for handling cases involving child sexual abuse within and among the Children's Aid Societies, the Police Department and the Crown Attorney's Office;

- training of child sexual abuse specialists which the above systems have been requested to designate for the purposes of implementing and refining the integrated protocol in co-operation with other relevant systems;

- reconstitution of its legal advisory committee to give further consideration to issues which require statutory amendment versus policy and procedural change;

- creation of crisis support groups, initially for female victims and their mothers, to provide immediate assistance following disclosure of sexual abuse;

- sponsorship of an intensive training institute for treatment personnel, designed to stimulate the development of additional expertise in the treatment of child victims, offenders, and their families;

- implementation of a preventive education project for children in Kindergarten to Grade VI, aimed at early detection and prevention of sexual abuse in the context of personal safety measures; and

- development of plans to support continuing co-ordination and consolidation of efforts beyond October 1983.

Further details of these and other initiatives are described in the interim report of the Special Committee, Developing a Comprehensive Response to Child Sexual Abuse, which is available on request.

Purpose of the Legal Review and Consultation

The following background paper examines the legal context of child sexual abuse. More particularly, the focus is on the child welfare and criminal justice systems which together have primary responsibility for mobilizing the legal response to the problem. The review was commissioned by the Special Committee in an attempt to understand the experience of children involved in either child welfare or criminal justice proceedings as a result of sexual abuse. As such, the results can provide valuable direction in re-shaping those legal policies and procedures which inadvertently place child victims in further jeopardy.

The paper was reviewed by the Special Committee at a meeting on November 3, 1982. In approving the action plan for the next year, members agreed to publish and circulate the paper for information and further consultation. In doing so, it must be emphasized that the opinions expressed in the paper are those of its author, Marion Lane, and are designed to stimulate discussion and debate of critical issues as opposed to prescribing a rigid formula for response.

The Special Committee will be pleased to receive any and all responses to the paper, including reaction to the specific recommendations. Comments should be received no later than May 31, 1983, so that they can be given appropriate consideration by the legal advisory committee prior to further action through the Special Committee.

Lorna Grant
Co-ordinator

November 30, 1982

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B Amendments proposed by the Minister of Justice on Bill C-53, June 1982.

C The House of Commons of Canada, Bill C-127, as passed August 4, 1982.

D Children's Aid Society of Metropolitan Toronto, Policy Manual 01.07.03-C. Indicators of High Risk Sexual Abuse.

E Offences defined by The Criminal Code of Canada (prior to Bill C-127) which could be included in acts of sexual abuse.

F Canada Criminal Code 1981.

G Statistics provided by the Office of the Official Guardian Child Representation Program.

H Metropolitan Toronto Police District and Divisional Boundaries, 1979.

I "Dynamics of Intra-Family Child Sexual Abuse and Principles of Child Development", from American Bar Association. Child Sexual Abuse and the Law.

J Additional materials from our survey of occurrences of sexual assault against children, 1979.

K Members, Metropolitan Chairman's Special Committee on Child Abuse

L Statement of Principles, Metropolitan Chairman's Special Committee on Child Abuse

INTRODUCTION

Objectives of Review

This study was undertaken to assist in the development of a co-ordinated approach to child sexual abuse in Metropolitan Toronto. The primary objective was to review current practices in the child welfare and the criminal justice systems, and, more particularly, to identify legal and procedural issues affecting the disposition of cases. It was assumed that a compilation of the existing practices would highlight present problems and provide a baseline for future change.

The study was not intended as empirical research on child sexual abuse. Our methodology has been to provide a "snap-shot" of current perceptions and practices as a prelude to concrete action, for the purpose of immediate policy and program development. The review does not deal with issues related to prevention, detection or treatment. These are addressed by other components of the Special Committee's total program, and are referred to here only insofar as they impinge on the two legal processes under review. (See foreword for description of initiatives in other areas).

Our premises throughout have been that the victim of sexual abuse is to be believed, that use of the Courts facilitates treatment of the offender and the family, and that mechanisms must be mobilized to minimize the trauma of Court intervention on the child. To achieve these objectives, inter-disciplinary co-operation between social agencies and the criminal justice system is essential. A first step in that direction, however, is a common understanding of our present situation. Hence, the purpose of this report.

The recommendations suggest changes in both the child welfare and the criminal justice systems. They reflect the opinions of the author and are not necessarily those of the Metropolitan Chairman's Special Committee on Child Abuse. They are intended to be used as guidelines for discussion by the Special Committee and the relevant mandated systems in developing joint protocols for handling these cases. Where legislative amendments are desirable, suggestions for changes in the law are also included. Again, these require further development by the Special Committee's Legal Advisory Committee and other appropriate bodies.

For the purposes of clarity, the term "sexual abuse" has been used throughout. Although the term has no current legal definition, we have used it to describe any form of sexual contact, direct or indirect, between a child and an adult. It is assumed that any contact of this nature is inherently abusive to a child since it is designed to satisfy adult needs and involves a child who, by virtue of age and position, is unable to give consent.

Methodology

Our research was based on interviews with individuals working in a variety of positions in both the child welfare and the criminal justice systems. These interviews were intended to provide an impressionistic overview of present policies, practices and issues affecting legal responses to child sexual abuse.

The interviews were supplemented by records made available through the generosity of the Children's Aid Society of Metropolitan Toronto (M.C.A.S.), the Metropolitan Toronto Police Department, and the Office of the Official Guardian.

Our sample of M.C.A.S. records consisted of 66 reports of sexual abuse involving 84 children filed by social workers with the Executive Assistant of the Society during 1980 and 1981. As the M.C.A.S. computer code for "reasons for investigation" does not distinguish sexual abuse from other cases of alleged child abuse, the computer printout of cases could not identify sexual abuse cases specifically. Our sample, therefore, was drawn from the internal M.C.A.S. forms and the Forms 6 and 7 used to report to the Provincial Child Abuse Register. These reports are mandatory in all child abuse cases and, in principle although not in practice, are to be forwarded to the Executive Assistant within seven days. As some reports could not be readily located, our sample represents 83.5% of the total (79) cases of sexual abuse identified by the Society in the two years.

Our review of Police records was based on 175 sexual offence occurrences against girls fifteen years of age and under reported to the Metropolitan Toronto Police in 1979. This included all reports of rape, attempt rape, sexual intercourse with a female under 14 years of age, sexual intercourse with a female 14-16 years and incest, plus one-quarter of the reported occurrences of indecent assault female. Multiple coding and coding errors reduced the sample to 153 cases. The year 1979 was chosen to ensure that cases going through the Courts were completed.

The occurrence reports indicate the facts of each complaint, the nature of the Police investigations, what charges were laid, if any, and the reason for a decision not to charge. To follow how cases progressed through the Courts, we examined the record of Court procedures and documentation (the "dope sheet") kept on each defendant who was charged. Dope sheets were readily available for 52 of the 68 adult defendants in our sample. Eleven of the remainder were traced through The Criminal Identification Bureau of the Police Records Department.

The statistics compiled by The Child Representation Program in the Office of the Official Guardian were used for comparative purposes only, to illustrate the results of sexual abuse cases across Ontario from February 1, 1980 to January 31, 1982. To ascertain whether cases are handled differently in different localities would require examining each of the 308 files by hand. This was beyond the scope of our investigation.

Content

The body of the report is presented in three sections, with relevant footnotes at the end of each.

The first section reviews the legal context of child sexual abuse and examines law and procedures in both the child welfare and criminal jurisdictions.

Next, the response of the child welfare system to child sexual abuse is reviewed, including a review of relevant literature, current practices and the opportunities presented by the forthcoming omnibus legislation on children's services.

Finally, child sexual abuse is examined in the context of the criminal justice system, including a review of practices related to investigation, laying charges, treatment of the victim and accused, convictions and sentencing.

For reference, a summary of findings and recommendations is also presented, followed by acknowledgements and appendices.

THE LEGAL CONTEXT

I. Introduction

The law relevant to the sexual abuse of children is complex. Our purpose here is not to write a treatise, but to provide a context for the studies which follow. This requires a review of Provincial child welfare legislation, Federal criminal law, the applicable procedures, and rules of evidence. We will also indicate recent changes in Canadian law, and further proposals that are on the horizon.

II. The Constitutional Division of Powers

The sexual abuse of children is a legal problem which arises at the interface of the Canadian legal system. The Criminal Code of Canada, a Federal statute, creates a host of offences applicable to sexual abuse. Criminal Court procedures and applicable evidentiary rules are similarly governed by Federal legislation as interpreted by the Courts.

The administration of justice, by contrast, is a Provincial responsibility. The Province thus regulates or administers the Police, the prosecution of offenders, the organization of the Courts, the appointment of judges in the Provincial Courts (Family and Criminal Divisions), short-term corrections facilities and probation services. The implementation of changes in Federal criminal law is thus the responsibility of the Province.

The Province also exercises what are called "quasi-criminal" powers. Sexual molestation, for example, is a form of child abuse prohibited by Provincial law and subject to prosecution under The Provincial Offences Act and the rules of the Ontario Evidence Act.

State intervention to protect abused children under sixteen years of age is also within Provincial authority. The Child Welfare Act requires incorporated Children's Aid Societies to provide prevention, investigation, protection and counselling services to abused children and their families.[1] Court intervention on behalf of such children is by civil proceedings in the Provincial Court (Family Division).

III. Child Welfare Law and Procedure

1. Reporting

All incidents of suspected child abuse including sexual molestation must by statute be reported immediately to the Children's Aid Society.[2] This duty to report child abuse takes precedence over conflicting duties of confidentiality[2a] (including the statutory duty not to disclose information relevant to venereal disease).[2b] Professionals and officials who fail to report suspected abuse are liable to a fine of $1000.00 and/or imprisonment for one year. Child abuse is defined to include "a condition of.....sexual molestation,"[3] but there is no statutory definition of "sexual molestation."

2. Investigation

Provincial Standards require that the Society initiate an investigation within one hour of receiving a report of abuse.[4] The intake worker is to obtain and record all details, check Society records and the Provincial Child Abuse Register. The worker assigned to the case is to consult her/his supervisor, and agree on a plan of investigation.

Metro Children's Aid Society policy requires that, in all cases of alleged sexual abuse, the local Police Division must be notified immediately and consulted prior to any Society investigation.[5] Standing orders of the Metropolitan Toronto Police Department similarly require the Police to notify immediately and consult with the Society should they receive a report of suspected abuse.[6] At this time, a decision will be made as to the most effective means of investigation.

Policy of both M.C.A.S. and the Police mandates a mutual sharing of relevant information. Primary responsibility for protection of the child remains with the Society. It is considered advisable, however, for the Society and the Police to be "involved jointly, whenever possible, in decisions concerning the protection of the child."[7] The Police retain primary responsibility for the enforcement of law and the prosecution of offences. It is recommended, however, that "where the Police are considering a criminal prosecution, they should normally consult with the C.A.S. and other involved professionals prior to laying charges."[8]

Where the Society conducts an investigation, Provincial Standards require the worker to visit the home and discuss the complaint face-to-face with the parent or caretaker, the child, and other siblings.[9] Unless Police investigations take precedence, the worker is required to interview the alleged abuser. If a medical examination is necessary or appropriate, the worker is advised to take the child with the parent or parental consent to the Hospital for Sick Children. To assist in the investigation of sexual abuse cases, the M.C.A.S. has defined "Indicators of High Risk of Sexual Abuse." (See Appendix D).

3. Conclusion of the Investigation

a. Complaint Not Substantiated

If the initial investigation provides no evidence of abuse, the file may be closed, or the family referred for services at the Society or elsewhere. Where other protection concerns exist, the Society or other agencies (public health, schools, day care) will monitor the situation until the child is considered safe.

b. Complaint Validated: Voluntary Provisions

Where indicators of abuse exist, the child may remain in the home on a voluntary supervision arrangement. This involves regular visits from the worker and perhaps referral to other agencies for treatment. M.C.A.S. policy requires that case conferences with other agencies involved take place at regular intervals.[10]

If the parent consents, the child may be placed with a relative or admitted into care on a voluntary basis for a maximum of six months (subject to extension to a maximum of twelve months). Such temporary care agreements by statute, however, are only to be used "where a parent through circumstances of a temporary nature is unable to make adequate provision for the child".[11]

c. Complaint Validated: Court Proceedings

In an emergency situation, where a Police Officer or the Society has reasonable and probable grounds to believe that a child is at risk (i.e., "in need of protection"), the child can be taken from the home to a place of safety ("apprehended") and held there pending a court hearing.[12] When this occurs, the child must be brought before the Provincial Court (Family Division) within five days.[13]

Where there is no immediate risk but removal from the home may be advisable, the Society can apply to the Court for an

Order to Produce. This requires the parent to bring the child before the Court to determine whether the child is in need of protection.

4. "Child in Need of Protection"

Further coercive state intervention to protect the child can occur only if the child is found to be "a child in need of protection" as defined by S. 19(1)(b) of The Child Welfare Act. The statutory definitions are as follows:

(i) a child who is brought, with the consent of the person in whose charge the child is, before a court to be dealt with under this Part,

(ii) a child who is deserted by the person in whose charge the child is,

(iii) a child where the person, in whose charge the child is, cannot for any reason care properly for the child, or where that person has died and there is no suitable person to care for the child,

(iv) a child who is living in an unfit or improper place,

(v) a child found associating with an unfit or improper person,

(vi) a child found begging or receiving charity in a public place,

(vii) a child where the person in whose charge the child is is unable to control the child,

(viii) a child who without sufficient cause is habitually absent from home or school,

(ix) a child where the person in whose charge the child is neglects or refuses to provide or obtain proper medical, surgical or other recognized remedial care or treatment necessary for the child's health or well-being, or refuses to permit such care or treatment to be supplied to the child when it is recommended by a legally qualified medical practitioner, or otherwise fails to protect the child adequately,

(x) a child whose emotional or mental development is endangered because of emotional rejection or deprivation of affection by the person in whose charge the child is, or

(xi) a child whose life, health or morals may be endangered by the conduct of the person in whose charge the child is.

A child who has suffered sexual molestation may be brought before the Court as a "child apparently in need of protection."[14]

5. Court Proceedings

a. Initial Court Hearing

At the first Court appearance after an apprehension, the Society is required to show cause why the child should remain in the interim care of the agency. For the purpose of determining temporary custody, the Court may base its decision on any evidence "the Court considers credible and trustworthy in the circumstances".[15] After this decision is made, the case is normally adjourned for a full hearing on the merits at a later date.

If the C.A.S. has not already done so, the Provincial Court Judge must determine at this time "whether legal representation is desirable to protect the interests of the child."[16] If so, the Judge directs that legal representation be provided for the child. In Metropolitan Toronto, this involves a Court referral to the Official Guardian's Child Representation Program, and the appointment of a lawyer from the panel of private lawyers maintained by the Official Guardian's Office. If the child already has a lawyer in Court (on a Legal Aid Certificate or otherwise), that lawyer has status to represent the child without further consideration of the matter.

b. Interim Proceedings

Under the rules of the Provincial Court (Family Division), full disclosure and an early resolution of the case are encouraged by several mechanisms. The Court may order full disclosure of material facts.[17] Case conferences are suggested "as soon as reasonably possible after the commencement of the proceedings".[18] To resolve or narrow the issues, informal pre-trials are recommended.[19] At the 311 Jarvis Court, the judges customarily require a pre-trial to be completed before a trial date will be scheduled.

c. Hearing on the Merits

When the case is ultimately heard, the judge will determine whether the child is in fact "a child in need of protection" and, if so, the appropriate disposition. Although these are separate legal issues, evidence going to both is customarily heard together. The child ten years of age and over is entitled to be present at any hearing.[20] The Court may hear "any person with evidence relevant to the hearing"[21] and may consider the past conduct of a parent to any child within his care.[22] The standard of proof required to make a finding is the civil standard, on the balance of probabilities.

d. Assessment

Where the child is found to be in need of protection, the Court may also order the child, and/or parent or other caretaker, to attend for an assessment.[23] On consent of all the parties, an assessment can also be obtained prior to a finding.

e. Disposition

If the child is found in need of protection, there are three possible dispositions.[24] The child may be returned home or to the custody of an "other person" subject to C.A.S. supervision for six to twelve months. In making such an order, the Court may impose "reasonable terms and conditions relating to the method of supervision".[25] Secondly, the child may be made a ward of the C.A.S. for a period not exceeding twelve months. Thirdly, the child may be made a Crown Ward. In both latter situations, the child is maintained in foster care, and access to the parent(s) and siblings becomes another issue to be resolved. The judge must determine the appropriate disposition according to the "best interests of the child" as defined in S. 1(b) of The Child Welfare Act.

6. Status Report

At any time thereafter, the Society may apply to the Court for a review of the child's status.[26] The Court then determines, having regard to the best interests of the child, whether circumstances justify the extension, variation or termination of the existing order. The Society is compelled to apply for a status review before the existing order expires.

The parent or guardian of the child, and the child twelve years of age or over, can also apply for a status review. To do so, however, they must wait six months after the making of the existing order.

7. Child Abuse Register

Every C.A.S. receiving information concerning the abuse of a child must, after the information is verified, report it to the Director of the Provincial Child Abuse Register forthwith.[27] Guidelines prescribing how the report is to be verified and reported have been defined by the Ministry of Community and Social Services.[28] Persons who are registered on the Register must be notified of that fact, and have the right to inspect the Register and to apply for a hearing to have their names expunged. The objectives of the Register are to track abused children and their families, to monitor child abuse case management, and to provide data for research on child abuse policies and programs.

IV. Criminal Law

1. Sexual Offences in Canada Prior to Bill C-127

The law of sexual offences in Canada is in a state of flux. On August 4, 1982, the House of Commons passed Bill C-127, An Act to Amend the Criminal Code in Relation to Sexual Offences. This Bill is at present awaiting approval by the Senate and will likely be proclaimed in effect January 1, 1983. (See Appendix C).

To understand the importance of Bill C-127, it is necessary to review the law of sexual offences as it exists at present, before Bill C-127 comes into effect. We will then compare the new legislation and assess its impact.

Sexual abuse per se is not an offence proscribed by The Criminal Code. There have been, nevertheless, at least twenty-nine specific offences defined by the Code which could be construed as types of sexual abuse. A catalogue of these offences is found in Appendix E.

For the purpose of our study, there are several sexual offences for which charges have been most commonly laid. These have been: rape, attempt rape, sexual intercourse with a female under fourteen years, sexual intercourse with a female between fourteen and sixteen, indecent assault on a female, and incest. The definition of these offences is found in Appendix F. There are essential elements to each of these offences which must be established if the Crown is to secure a conviction.

a. Rape

With respect to rape, the Crown must prove an intent to have intercourse, that penetration "to even the slightest degree, notwithstanding that seed is not emitted" [29] occurred, that the complainant was not the wife of the defendant, and that the complainant did not voluntarily consent. Where rape itself cannot be established, attempt rape and indecent assault female are included offences. [30]

b. Incest

Incest can occur only where there is a known blood relationship of parent/child, brother/sister, half-brother/half-sister, grand-parent/grand-child, and sexual intercourse intentionally occurs between them. A child cannot be an accomplice to incest where she was under the legal age to consent (14 years) or her submission is obtained by misrepresentation, restraint, duress, or fear. [31] The Criminal Code provides that no accused can be convicted of incest upon the evidence of only one witness, unless that evidence is "corroborated in a material particular by evidence which implicates the accused". [32]

c. Sexual Intercourse with a Female Under 14 Years

The statutory rape (sometimes called "carnal knowledge") offences are quite different. Sexual intercourse with a female under the age of 14 years is an offence on proof that penetration occurred, that the girl was not his wife, and that she was under the age of fourteen years. This is an absolute liability offence. The defendant's reasonable belief that the complainant was over the age of fourteen years is not a defence. [33] By virtue of S.140 of The Criminal Code, a child under fourteen years can give no effective consent to either sexual intercourse or indecent assault.

d. Sexual Intercourse with a Female 14-16 Years

Sexual intercourse with a female over 14 and under 16 years of age, on the other hand, requires proof that the girl was of the relevant age (regardless of the defendant's belief), that she was not the defendant's wife and that she was "of previously chaste character". [34] Proof that the complainant was not previously of chaste character is on the accused. [35] Chaste character and virginity are not synonymous. [36] Evidence that the complainant had sexual intercourse with the accused prior to the time of the alleged incident is not evidence of an unchaste character. [37] There will be an acquittal, however, if the Court finds that as between the accused and the complainant, the accused is not "more to blame" than the girl for the particular incident. [38] As "blame" rather than consent is a key element of this offence, indecent assault female is not an included offence under S.146(2). [39]

e. Indecent Assault Female

Indecent assault requires an intent to perform an act which is objectively indecent, [40] or which could be interpreted as indecent from the surrounding circumstances and the words spoken. [41] A touching, however slight, is sufficient and no hostile act is necessary.[42] Lack of consent is an essential element of the offence. A child under 14 years, however, cannot consent to indecent assault.[43] Common assault is an included offence.[44]

2. The Effect of Bill C-127 (See Appendix C)

a. New Offences

The new legislation will make several significant changes in Canadian criminal law. Rape, indecent assault, and common assault, among others, are offences repealed by the new Bill. They will be replaced by a hierarchy of new offences, including assault,[45] sexual assault,[46] sexual assault with a weapon, threats to a third party or causing bodily harm,[47] and aggravated sexual assault where "in committing a sexual assault, the accused wounds, maims, disfigures or endangers the life of the complainant.[48] Incest and the carnal knowledge offences remain unchanged, except insofar as the rules about proof of unchaste character in the carnal knowledge (14-16 years) offence have been repealed (inadvertently, it appears).[49]

b. New Rules of Evidence

To overcome certain problems which have arisen in the past in the trial of rape and related sexual offences, Bill C-127 makes several important changes concerning the types of evidence that will be admissible in these cases.

- A basic change is that, where an accused is charged with incest, gross indecency or any of the sexual assault offences, corroboration will not be required. Judges are specifically directed "not to instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration".[50] This does not extend as yet, however, to the unsworn evidence of a child.[51]

- Out-of-Court statements by the complainant as to what happened to her (recent complaint evidence) will no longer be admissible.[52]

- Evidence of the sexual activity of the complainant cannot be introduced on behalf of the accused except for limited purposes and under strictly-controlled conditions.[53]

- Evidence of sexual reputation will not be admissible to challenge or support the credibility of the complainant.[54]

- The wife or husband of a person charged with incest, carnal knowledge or any of the new sexual assault offences (among others) will be a competent and compellable witness for the prosecution without the consent of the person charged.[55] The privilege of a spouse not to disclose any communication made by the other spouse during their marriage, however, remains.[56] This is a privilege that can be claimed by the witness, not the accused.[57]

- Similarly, a spouse of a person charged with any of the new physical assault offences (among others) will be competent and compellable "where the complainant or the victim is under the age of fourteen years".[58]

The impact of Bill 127 is not yet clear. Abolition of the statutory requirement of corroboration for incest brings this offence into line with the rules applicable to other sexual offences since the mid-1970's. Greater control over the conduct of judges and of defence counsel should reduce the potential for harassment of the witness at trial. Abrogation of the rules relating to recent complaint evidence will make it impossible to draw adverse inferences where no recent complaint exists.

The inability to introduce complaint evidence, on the other hand, may make it more difficult to secure a conviction where children are involved. Complaint evidence at present is used for the limited purpose of supporting the complainant's credibility and consistency.[59] Where the word of a child is against that of an adult, the complaint evidence is often necessary to secure a conviction beyond a reasonable doubt. There is some question how this burden of proof will be established in the future if such evidence is inadmissible.

V. Criminal Procedure

The basic elements of criminal procedure in Canada are set out in the accompanying flow chart, and are described more precisely in our subsequent study. The major procedural distinction arises between what are called "summary" and "indictable" offences. Summary offences proceed automatically in Provincial Court (Criminal Division), the lowest level of Criminal Courts. Indictable offences are considered more serious, and can proceed in a variety of ways at the choice of the accused. Some offences (e.g. "assault and "sexual assault" under Bill C-127) are "hybrid" offences in that the Crown has a choice, to proceed in summary fashion or as an indictable offence.

The accused charged with an indictable offence generally has an election as to how he will proceed. He can elect to be tried immediately in the Provincial Court (Criminal Division). Alternatively, he can elect to be tried at the County Court level, by a County Court judge alone or by a County Court judge and jury. County Courts are a higher level of Criminal Court, where the judges are appointed by the Federal Government.

The accused who elects to proceed in County Court has the right to a preliminary inquiry before a Provincial Court judge. The purpose of this hearing is to determine if the Crown has sufficient evidence to proceed to trial. Where sufficient evidence is shown, the judge will commit the accused for trial. Otherwise, he will be discharged immediately. With the consent of the Crown, the accused can waive his right to hear evidence at the preliminary hearing, and be committed for trial directly. When the accused appears in County Court, he is then entitled to re-elect trial by judge alone or by judge and jury as the case may be.

VI. Evidentiary Issues in the Testimony of Children

1. Qualification to Testify

A basic problem in prosecution of sexual offences against children is the requirement that the child, as the leading Crown witness, be found competent to testify. A child can give sworn evidence, or unsworn evidence. At common law and by statute, however, the unsworn evidence of a child must be corroborated by some other material evidence. The Criminal Code provides, moreover, that no one shall be convicted of an offence upon the unsworn evidence of a child "unless the evidence is corroborated in a material particular that implicates the accused".[60] Whether or not a child can be sworn, therefore, is a key issue.

The evidence of a child can be sworn if, in the opinion of the judge, the child understands the nature of an oath. A child of 14 years of age is presumed to have the capacity to understand an oath.[61] A very recent Ontario Court of Appeal decision (Fletcher, November 2, 1982) holds that to understand the nature of an oath does not require a belief in God or in another Almighty. It is sufficient if the child feels a moral obligation or is conscience-bound to tell the truth. The several actual examinations of children set out in the decision indicate that even a cursory examination of the child may now be sufficient to qualify the child to give sworn evidence.[62]

Where the child does not qualify to give sworn evidence, however, she may still testify if the judge finds that "the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth".[63]

2. Corroboration

Where such unsworn evidence is given, however, there must be independent evidence which shows or tends to show not merely that the offence was committed, but that it was committed by the defendant.[64] The key characteristics of corroboration are that it is independent of the evidence of the victim, and that it connects the accused with the offence.

Although it is considered "dangerous to formulate the kind of evidence that can be corroboration",[65] still it may be instructive for background purposes. Medical evidence is generally good corroboration[66], as may be the distraught, emotional condition of the victim.[67] Similar acts of the accused may be admissible as corroboration to show plan, method or system[68] or to show an existing passion.[69] The testimony of witnesses that the accused and the complainant were behind a locked door under suspicious circumstances,[70] or that they were engaged in preliminary activities calculated to culminate in intercourse[71] has been accepted as corroboration. Conflicting statements by the accused,[72] false testimony by the accused,[73] or an attempt by the accused to have the complainant drop the charges,[74] are all corroboration.

There is, furthermore, an increasing tendency to reject the technical definition of corroboration in favour of a more common sense approach. The Supreme Court of Canada has recently held,[75] for example, that the "existing law of corroboration is unduly and unnecessarily complex and technical" and that corroboration should be given its common sense meaning of no more than evidence tending to confirm the story of the complainant so that the complainant can be believed and the accused convicted. Approval was expressly given to an earlier decision of the Court,[76] where Mr. Justice de Grandpre quoted English cases to the effect that:

> "The word "corroboration" had no special technical meaning; by itself it meant no more than evidence tending to confirm other evidence. No distinction could, therefore, be drawn between evidence which could be used as corroboration and evidence which might help the jury to determine the truth of the matter."

This tendency of the Supreme Court towards an increasingly liberal approach to corroboration was specifically articulated in the context of the law applicable to accomplices, and not to the unsworn evidence of children. It does not extend to the standard of "evidence in a material particular that implicates the accused" presently required by the Criminal Code. Although Bill C-127 abolished corroboration with respect to incest, the requirement of corroboration for the unsworn evidence of children remains. To the extent that the Supreme Court indicates preferred practices, however, the pressure for legislative change to liberalize the definition of corroboration generally is increasing.

3. Uniform Evidence Act (proposed)

Apart from new trends in the Supreme Court, there are on the horizon proposals for legislative change which could alleviate existing problems with the evidence of children. The proposed Uniform Evidence Act, now in its final stages of consultation, has two sections that are relevant. The first simplifies qualification of the child as a witness:

> 96.(1) Where a proposed witness is a person of seven or more but under fourteen years of age or is a person whose mental capacity is challenged, the Court, before permitting that person to give evidence, shall conduct an enquiry to determine whether, in its opinion, that person understands the nature of an oath or a solemn affirmation and is sufficiently intelligent to justify the reception of his evidence.

> (2) A party who challenges the mental capacity of a proposed witness of fourteen or more years of age has the burden of satisfying the Court that there is a real issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation.
>
> 97. A person under seven years of age or a person who cannot given evidence under section 96 shall be permitted to give evidence on promising to tell the truth if, in the opinion of the Court after it has conducted an inquiry, that person understands that he should tell the truth and is sufficiently intelligent to justify the reception of his evidence.

The second abolishes the need for corroboration, with the caveat that the judge shall instruct the jury of the special need for caution where the evidence is unsworn.

> 125. (1) Subject to subsection (2), no corroboration of evidence is required and no warning concerning the danger of acting on uncorroborated evidence shall be given in any proceeding.
>
> (2) The Court shall instruct the trier of fact on the special need for caution in any case in which it considers that an instruction is necessary, and shall in every case give the instruction with respect to (a) the evidence of a witness who has not testified taking an oath or making a solemn affirmation.

These provisions would be an improvement over the existing law in several respects. The former "child of tender years" would be codified as a child under fourteen years of age. A child seven to fourteen years would be entitled to "make a solemn affirmation" in lieu of taking an oath. This would be analogous to present practice with respect to adults and would facilitate the provision of "sworn" testimony by those religious (and non-religious) groups for whom the swearing of an oath is inappropriate. Legislative recognition that children under seven years may have the capacity to undertand and tell the truth would encourage greater use of younger children in Court.

There are defects in the proposals, however, which should be recognized. Increasingly, in other jurisdictions, there is a trend towards abolishing the competency requirements for children altogether.[77] This would permit any child to testify, to "let the story come out for what it is worth" and let the trier of fact determine the weight and credibility to be accorded to it. The proposed Uniform Evidence Act does not go this far.

An additional problem is created by the exception to the general abolition of corroboration. Where a judge is required to warn the jury "in every case" where unsworn evidence is given, any liberalization of the corroboration requirement may be undermined.

VII. Conclusion

Ontario law relating to the child protection system has been described as it exists at present. The Ministry of Community and Social Services, however, will shortly release a consultation paper describing proposed new omnibus legislation for children's services in Ontario. How these new proposals will affect existing law and procedure is as yet unknown.

Canadian criminal law relevant to the sexual abuse of children is in the process of major revision. Changes in the nature of sexual offences, the applicable rules of evidence, and in the rules applicable to the evidence of children are all on the horizon. To appreciate the changes, an understanding of the old law (as it exists at present) is required. The old law, moreover, provides the historical context for our study of how sexual abuse cases are handled in Metropolitan Toronto.

FOOTNOTES

1. The Child Welfare Act, R.S.O. 1980, c. 66, S. 6.
2. Ibid, S. 49.

2a. Ibid. S.49(3).

2b. Health Protection Act, (Bill 138), passed second reading in the Ontario Legislature June 29, 1982. Presently before the Social Development Committee of the Legislature.

3. Ibid, S. 47(1).
4. Ministry of Community and Social Services, Children's Services Division, Child Abuse: Standards and Guidelines, February 1981, INS-02.1, p. 13.
5. Children's Aid Society of Metropolitan Toronto, Policy Manual 01.07.02. (Rev. 2.81).
6. Metropolitan Toronto Police, Standing Order No. 19 "Child Abuse Guidelines", February 20, 1979.
7. Ibid.
8. Ibid.
9. COMSOC, Footnote No. 4, INS-03.1, 03.2, p. 15.
10. M.C.A.S. Policy Manual, Footnote No. 5, 01.07.06-A.
11. The Child Welfare Act, R.S.O. 1980, c. 66, S. 25(1).
12. Ibid, S. 21, 22.
13. Ibid, S. 27(1).
14. Ibid, S. 47(3).
15. Ibid, S. 28(16).
16. Ibid, S. 20(2).
17. Reg. 810, R.R.O. 1980 under The Provincial Courts Act, R. 20.
18. Ibid, R. 21.
19. Ibid, R. 23.
20. The Child Welfare Act, R.S.O. 1980, c. 66, S. 33.
21. Ibid, S. 28(3).
22. Ibid, S. 28(4).

23. Ibid. S. 29.

24. Ibid, S. 30(1).

25. Ibid, S. 30(4).

26. Ibid, S. 32, 37, 38.

27. Ibid, S. 52(2).

28. Ontario Ministry of Community and Social Services, Children's Services Division, Child Abuse: Guidelines for Reporting to the Register, February 1981.

29. Criminal Code, S. 3(6)

30. R. v. Smith (1979) 43 C. C. C. (2d) 417 (S.C.C.)

31. Bergeron v. R. (1930) 56 C.C.C. 62 (Que C.A.)

32. Criminal Code, S. 139(1). See discussion of corroboration pp. 13-14.

33. R. v. Hurd (1972), 7 C.C.C. (2d) 90 (Ont. C.A.)

34. Criminal Code, S. 146(2)(b).

35. Criminal Code, S. 139(3)

36. R. v. Johnston (1948) 91 C.C.C. 59 (Ont. C.A.)

37. Criminal Code, S. 139(4)

38. Criminal Code, S. 146(3)

39. R. v. Gerich (1980) 53 C.C.C. (2d) 414 (Ont. C.A.)

40. R. v. Resener (1968) 4 C.C.C. 129 (B.C.C.A.)

41. R. v. Mckeachnie (1975) 26 C.C.C. (2d) 317 (Ont. C.A.)

42. Re. Stillo v. R. (1980) 56 C.C.C. (2d) 178 (Ont. H. Ct.)

43. Ibid., Criminal Code S.140

44. R. v. Croft (1978) 22 A. R. 224 (Dist. Ct.)

45. Criminal Code, S. 244 as amended by Bill C-127

46. Ibid, S. 246.1.

47. Ibid, S. 246.2.

48. Ibid, S. 246.3.

49. See Bill 127 (Appendix C) S.5 and the discussion of *Criminal Code* S.139(4) at p.9. The abolition of S.139 likely reflects the abolition of the carnal knowledge offences earlier proposed by Bill C-53, S.166 and S.167 (see Appendix B) and subsequently not enacted. The restoration of the carnal knowledge provisions in Bill C-127 without S. 139 (3) (4) makes no sense.

50. *Criminal Code*, S. 246.4 as amended by Bill C-127.

51. See pp.12-13.

52. *Ibid*, S. 246.5.

53. *Ibid*, S. 246.6.

54. *Ibid*, S. 246.7.

55. *Canada Evidence Act* R.S.C. c. E.-10, s. 4(2) as amended by Bill C-127

56. *Ibid*, S. 4 (3).

57. *R. v. St. Jean*, (1976) 34 C.R.N.S. 378, (Que. C.A.).

58. *Canada Evidence Act*, S. 4 (3.1) as amended by Bill C-127.

59. *Thomas v. R.*, (1952) 2 S.C.R. 344.

60. *Criminal Code*, S. 586.

61. *R. v. Armstrong*, (1959) 125 C.C.C. 56 (B.C.C.A.).

62. This reverses the very restrictive test in *R. v. Budin*, (1981) 58 C.C.C. (2d) 352 (Ont. C.A.), which presupposed that the child had some religious instruction.

63. *Canada Evidence Act*, S. 16 (1).

64. *R. v. Baskerville*, (1916) 2 K.B. 658 at 667.

65. Audrey Wakeling, *Corroboration in Canadian Law*, Carswell, Toronto, 1977, p.15.

66. *R. v. Aubichon*, (1965) 44 C.R. 65 (Sask. C.A.).

67. *Murphy and Butt v. The Queen*, (1977) 2 S.C.R. 603.

68. *R. v. Bildson*, (1966) 1 O.R. 787 (Ont. H.C.).

69. *R. v. Williams*, (1973) 12 C.C.C. (2d) 483 (Ont. C.A.).

70. *R. v. Williams*, (1973) 12 C.C.C. (2d) 453 (Ont. C.A.).

71. *R. v. Parish*, (1968) S.C.R. 466.

72. *White v. The Queen*, (1956) S.C.R. 709.

73. *R. v. Beddos*, (1952) 15 C.R. 87 (Sask. C.A.).

74. Plazza v. The Queen, (1978) 2 S.C.R. 907.

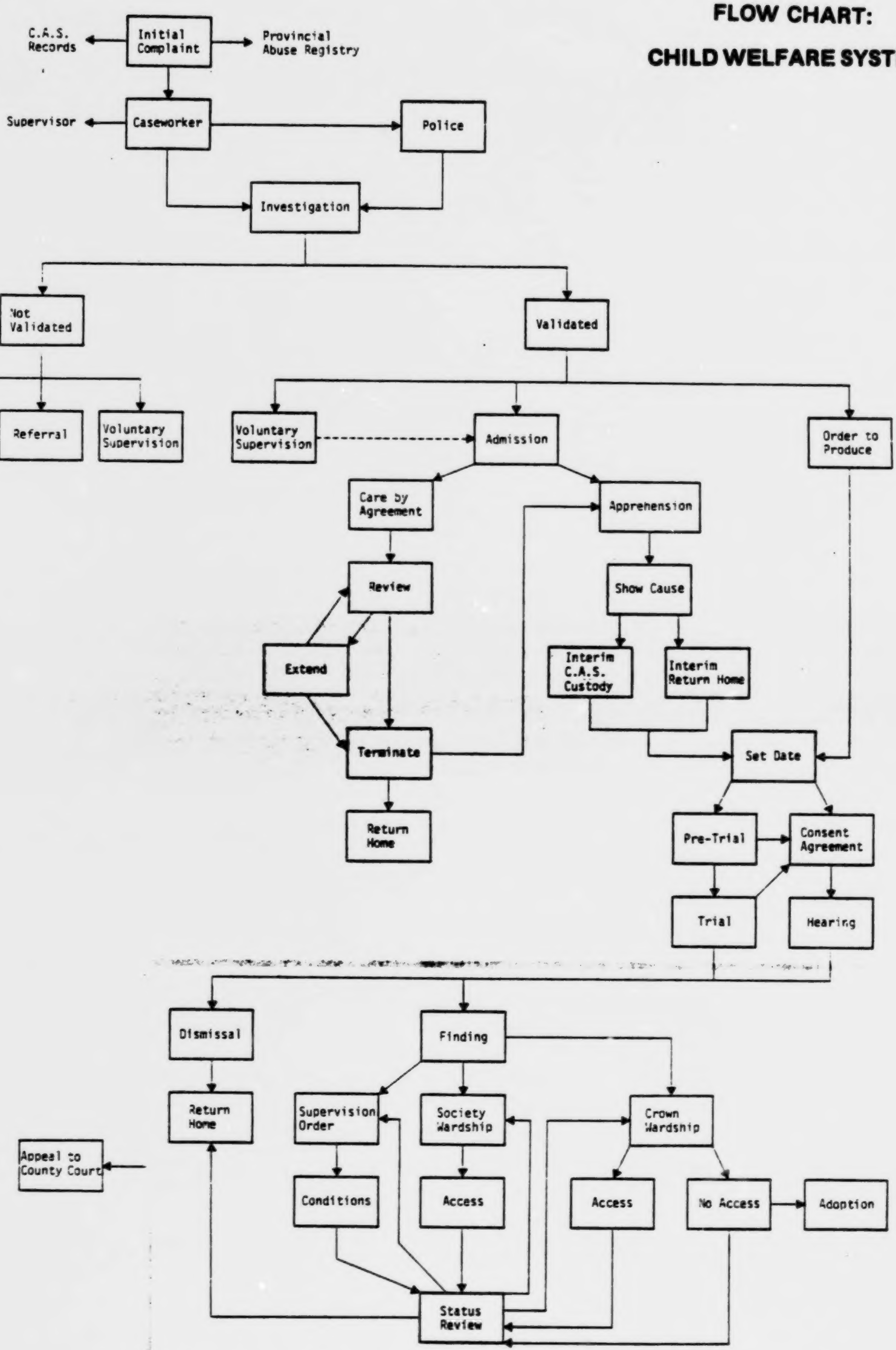
75. Vetrovec, Gaja v. R., May 31, 1982, unreported (Dickson J.).

76. Warkentin et al v. The Queen, (1977) 2 S.C.R. 355.

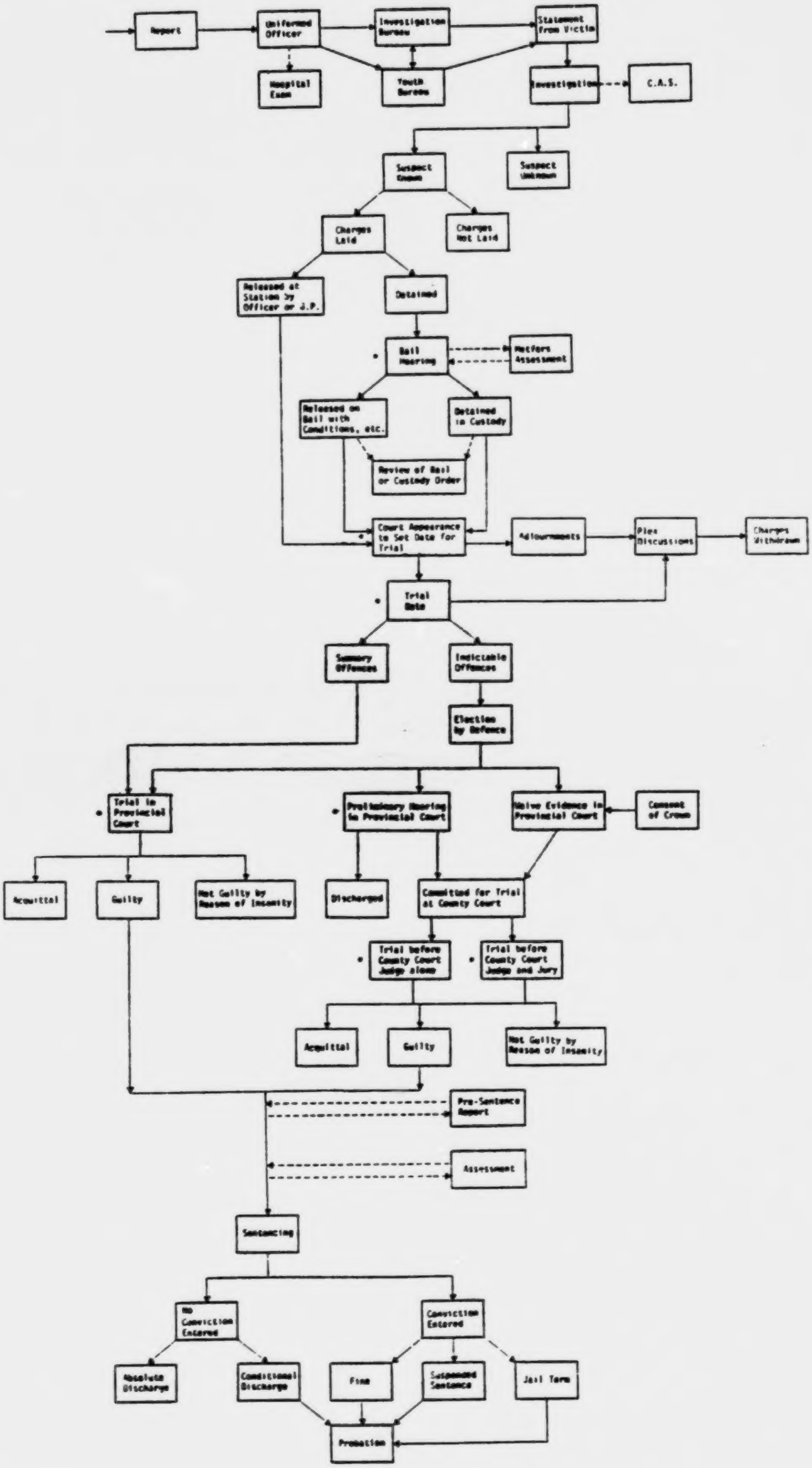
77. United States Federal Rules of Evidence. Rule 601.

FLOW CHART:

CHILD WELFARE SYSTEM


C.A.S. Records
Initial Complaint
Provincial Abuse Registry
Supervisor
Caseworker
Police
Investigation
Not Validated
Validated
Close
Referral
Voluntary Supervision
Voluntary Supervision
Admission
Order to Produce
Care by Agreement
Apprehension
Review
Show Cause
Extend
Interim C.A.S. Custody
Interim Return Home
Terminate
Set Date
Return Home
Pre-Trial
Consent Agreement
Trial
Hearing
Dismissal
Finding
Return Home
Supervision Order
Society Wardship
Crown Wardship
Appeal to County Court
Conditions
Access
Access
No Access
Adoption
Status Review

FLOW CHART: CRIMINAL JUSTICE SYSTEM


Report
Uniformed Officer
Investigation Bureau
Statement from Victim
Hospital Exam
Youth Bureau
Investigation
C.A.S.
Suspect Known
Suspect Unknown
Charges Laid
Charges Not Laid
Released at Station by Officer or J.P.
Detained
* Bail Hearing
Metfors Assessment
Released on Bail with Conditions, etc.
Detained in Custody
Review of Bail or Custody Order
* Court Appearance to Set Date for Trial
Adjournments
Plea Discussions
Charges Withdrawn
* Trial Date
Summary Offences
Indictable Offences
Election by Defence
* Trial in Provincial Court
* Preliminary Hearing in Provincial Court
Waive Evidence in Provincial Court
Consent of Crown
Acquittal
Guilty
Not Guilty by Reason of Insanity
Discharged
Committed for Trial at County Court
* Trial before County Court Judge alone
* Trial before County Court Judge and Jury
Acquittal
Guilty
Not Guilty by Reason of Insanity
Pre-Sentence Report
Assessment
Sentencing
No Conviction Entered
Conviction Entered
Absolute Discharge
Conditional Discharge
Fine
Suspended Sentence
Jail Term
Probation

* A plea may be entered at any stage marked with an asterisk. The judge presiding in Court when the plea is entered is seized with the case for the purpose of sentencing.

SEXUAL ABUSE AND THE CHILD PROTECTION SYSTEM

I. Introduction

Primary responsibility for the protection of sexually abused children in Metropolitan Toronto lies with the three Children's Aid Societies. These are The Children's Aid Society of Metropolitan Toronto, The Catholic Children's Aid Society, and The Jewish Family and Child Service of Metropolitan Toronto. As a baseline for our policy development process, we have attempted to develop a profile of how these agencies presently process sexual abuse cases. Again it must be emphasized that time constraints necessarily limited the scope of our study, and our results are not comprehensive. It is our expectation, however, that they are suggestive of patterns and problems which exist.

II. Existing Literature Relevant to Metropolitan Toronto

Notwithstanding the pervasive emphasis on child abuse in recent years, there is a general lack of empirical data on how sexual abuse cases are handled. Three existing studies, however, indicate some aspects of the prevailing practice prior to 1977.

1. Michele D'Iorio, "Father-Daughter Incest: Outcome and Management" (1978) [1]

This is an analysis of twenty-five families referred to treatment centres and to the M.C.A.S. during 1966-1976 because of incestuous relationships between the father and one or more of his daughters. This discussion will be limited to her findings relevant to M.C.A.S. intervention.

An initial observation was that if the family seemed co-operative and ready to be involved with the agency, "it was not considered theoretically mandatory to involve the Police". [2] Nevertheless, of eighteen cases involved with the M.C.A.S., fifteen involved the laying of charges and taking the father to Criminal Court. D'Iorio indicates that five of the girls were brought to Court for delinquent behaviour. Her data, however, does not show how many cases were taken to Family Court in protection proceedings.

D'Iorio's study indicates that the M.C.A.S. did not deal with the girls in any consistent way. The anti-social and acting-out girls were generally referred for individual psychotherapy. As D'Iorio indicates, however:

> "(This is) not meant as a criticism of the workers involved....but as a reflection of

> the current state of treatment. Once the client had been visited on repeated occasions and continued to deny the existence of any problems when they were obvious to everyone else, workers were faced with the problem of how to engage such families in a treatment plan which would be beneficial to them and minimize the impact of distorted family relationships...." [3]

D'Iorio notes that the most disturbed girls often came from families who could not be engaged at all with the agency. They did not keep appointments, reacted to anxiety by running away, and did not stay long enough in one place to initiate any valid management plan. Ultimately, five required Court intervention and removal from their homes. D'Iorio notes that there was no long-term follow-up on any of these girls. [4]

The girls who stayed home and caused no difficulties, when treated, responded well to either individual or group therapy. They generally were not treated, however, unless repeated medical intervention for depression, psychosomatic complaints or suicide attempts led to a subsequent psychiatric referral. Only one of this group was placed in a foster home. Although parents were involved in therapy in a few cases, D'Iorio found it "surprising how infrequently family therapy was recommended or attempted". [5]

Another problem identified by D'Iorio was the emotional reaction of M.C.A.S. workers. This ranged from initial anxiety, disgust and disbelief, followed by a punitive or bewildered approach combined with anger at the family's denial and their sabotaging efforts to assist. These emotional reactions combined with overloaded caseloads deprived the workers of the time to devote to these families and made therapy erratic. [6]

2. Macrina Donovan, "Sexual Assault of Children Under Twelve Years", (1978) [7]

This is a review of the experience of fifty children under twelve years of age, treated between January 1972 and January 1976 at the Hospital for Sick Children, following an alleged sexual assault. The history of each child's case was traced using the records of the Metropolitan Toronto Police Youth Bureau, the M.C.A.S. and the Catholic Children's Aid Society. Again, our focus at this point is on the child welfare implications of this study.

A principal conclusion of her study was the existence of a filtering out process between the agencies as demonstrated by their records. Of fifty children in the hospital records, 54% appeared in C.A.S. records and only 42% in Youth Bureau files. [8] Notwithstanding an "automatic" referral policy, only 11 referrals were actually made from the Hospital for Sick Children to the C.A.S. In 16 cases, the C.A.S. was already involved with the family. In 23 cases, there was no record of referral or C.A.S. involvement at all. [9] There was also no indication on the hospital records of the reasons for a non-referral. Donovan found, furthermore, that of seven incest cases in her sample, four were referred to the C.A.S., and none was referred by the hospital for psychiatric or psychological help.

Her analysis of how these cases were handled by the C.A.S. was limited by the nature of the C.A.S. records. She found, for example, little or no reference in the records to the sexual assaults of the children, nor any indication of the psychological or other trauma experienced by the child. [10] The families were multi-problem families with "so many other problems in the family of higher priority that the case workers did not have time to spend with the children and the families coping with the sexual assaults". [11] She also found that "whether due to the heavy caseloads of the social workers or the absence of an appropriate sexual assault management program, follow-up care was lacking...." [12]

3. Joan Tator and Katharine Wilde, "Child Abuse and the Courts: An Analysis of Selected Factors in the Judicial Processing of 'Child Abuse' Cases" (1980) [13]

This paper examined 106 cases of child abuse identified at the Hospital for Sick Children and subsequently brought before the Provincial Court (Family Division) between January 1973 and December 1977. Unlike the other studies, their emphasis was on the Court process and its relationship to ultimate disposition.

Their findings indicate that:

- Sexual abuse was not treated differently in the Court process from non-sexual abuse. [14]
- The high percentage of apprehensions (64.3%) did not correlate with the ultimate disposition, and perhaps indicated an initial over-reaction by the agency. [15]

- In 54.7% of cases, children were taken out of the home for extended periods of time. The average time spent in care during adjournments was 176.4 days (5.8 months). There was no relationship between the amount of time in care and the ultimate disposition.[16]

- The mean duration from first appearance to final disposition was 454.3 days (15 months). There was an average of 3.8 adjournments per case with an average duration of 42.8 days each.[17]

- The majority of adjournments (58.4%) were caused by the Court itself. Overloaded Court calendars, the failure of the judge seized with the case to sit, and the desire to secure an assessment, were the predominant reasons noted for the delay.[18]

- There is no such thing as a "typical" outcome in a case. Actual disposition was:

Crown wardship	27.6%
Society wardship	22.6%
Society supervision	32.1%
Withdrawal/transfer	9.4%
Other	8.5%[19]

There was rather consistent agreement between the Society's recommendation and the actual disposition.

- Records of the same case at the Hospital for Sick Children and at M.C.A.S. were stored under different names, making co-ordination difficult and tedious. M.C.A.S. records lacked any standardized method of recording social and legal case information, making it impossible to determine whether particular factors existed or were not considered sufficiently important to record.[20]

The existing empirical literature on Metropolitan Toronto prior to 1977 thus highlights a host of problems. These include: unco-ordinated, vague and incomplete records; the existence of a "filtering out" process between agencies; a failure in referral policies; lengthy delays in the Family Court process; inconsistent and inadequate treatment services; untrained , overworked caseworkers; and a lack of any follow-up services. Changes in law and policy subsequent to the enactment of the 1978 Child Welfare Act may have remedied some of these problems. The purpose of this study is to follow-up on this earlier work, to determine the existing state of the system and the problems specifically associated with handling sexual abuse cases.

III. Current Practice

1. Reporting

a. Nature of Sexual Abuse Reports:

As "sexual molestation" is not defined by The Child Welfare Act, different Societies adopt different definitions. The M.C.A.S. defines "sexual abuse" as "the use of exploitation of a child for sexual or erotic gratification". 21 The Jewish Family and Child Service concurs with this general definition, but to structure the discretion of their workers has adopted a more narrow working definition of "sexual molestation" to mean "any inappropriate genital sexual contact between a child and an adult".

The lack of statutory definition also affects the scope of the mandatory reporting requirement. It is significant, for example, that in 1980-1981, over 1,000 sexual offence occurrences were reported to the Metropolitan Toronto Police involving victims fifteen years of age and under. 22 Yet, the M.C.A.S. records at our disposal identify only seventy-six cases of sexual molestation in the same years. C.C.A.S. records are not available. Assuming an equal number, however, the total incidents reported to the two protection Societies amount to only 13.2% of the actual identified occurrences over the two year period.

M.C.A.S. statistics indicate that 96.9% of the sample of cases reported to the agency involved assailants known to the child. 51.3% were fathers, step-fathers and foster fathers. The precise breakdown is as follows:

Father	18	(27.2%)
Step-father	12	(18.1%)
Family friend	9	(13.6%)
Uncle/grandparent	7	(10.6%)
Common-law partner	5	(7.5%)
Foster father	4	(6.0%)
Neighbour	4	(6.0%)
Tenant	4	(6.0%)
Babysitter	1	(1.5%)
Other	2	(3.0%)
	66	

The Police records indicate that 75% of the offenders whose relationships are clearly reported in the records were known to the victim and 25% were strangers.[23] Thirty-three per cent were caretakers or members of the victims' immediate family, 26.6% were acquaintances and 15.2% were friends.

Clearly, cases involving strangers and acquaintances (51.6% of the incidents reported to the Police where relationships can be determined) are not at present reported to the protection Societies. The Metropolitan Toronto Police, for example, have no specific definition of child abuse. The general presumption, however, is that child abuse for the purpose of mandatory reporting to the Societies is limited to abuse within the family.

This is, however, an arbitrary distinction which impedes the protection of children and inhibits rehabilitation within the family. In one particularly worrisome case reported in the Police records, two young children, six and seven years of age, talked very explicitly to the Police Officer about sexual activities with the babysitter. The mother, however, appeared unconcerned and the children were judged "too young" to proceed with charges. To clear the incident, the Police cautioned the mother about public mischief. Most alarming, however, there is no record of any referral of the children to the C.A.S.

Failure to report extra-familial abuse incidents to the C.A.S. has several very serious consequences. Children exposed to inadequate parenting (e.g. the "unconcerned mother") may remain at risk. If criminal charges are not pursued, there is no intervention to reassure the child or to help the victim and her family overcome the trauma of the sexual assault. Other children in contact with the alleged abuser may be exposed to risk.

b. Source of Reports

The same distinction between sexual abuse and other forms of sexual assault appears to exist in the perception of the public. Clearly, it is the Police and not the Society which receives the bulk of the reports. A comparison of the source of reports to the M.C.A.S. and to the Police also reflects significant differences in reporting patterns. Our survey indicates the following:

Source of Report to M.C.A.S. (1980-81)

Hospital or doctor	21	(31.8%)
Mother	12	(18.1%)
Police	10	(15.1%)
School	6	(9.0%)
Victim	5	(7.5%)
Neighbour	4	(6.0%)
Probation	2	(3.0%)
Foster mother	2	(3.0%)
Public Health	1	(1.5%)
Other	3	(4.5%)
Total	66	

Source of Report to Police (1979)

Mother	50	(32.6%)
Victim	29	(18.9%)
C.A.S.	15	(9.8%)
Father	12	(7.8%)
Neighbour/friend	10	(6.5%)
Other family	6	(3.9%)
Passerby	6	(3.9%)
School	4	(2.6%)
Hospital	1	(0.6%)
Unknown	20	(13.0%)
Total	153	

c. Current Trends

Some workers indicate an increased incidence of sexual abuse reports in recent months, perhaps reflecting greater public awareness of the problem. Reports increased significantly in Etobicoke, for example, in the year following an inter-agency educational program on sexual abuse. There appears also to be more reports coming from the victims themselves. Judges and lawyers working exclusively in the Courts, however, report seeing sexual abuse cases infrequently. This reflects the "filtering out" process which will be discussed in greater detail hereafter.

d. Provincial Incidence of Sexual Abuse

There is as yet no data available on the extent of sexual abuse against children in Ontario. An analysis of Police occurrence reports across the Procince would indicate only the extent of reported incidents. C.A.S. records are generally not programmed to identify all reports of suspected sexual abuse, as opposed to child abuse generally.

The Provincial Child Abuse Register has statistics of child abuse cases reported to the Registry from across the Province as follows:

	Total Child Abuse	Total Sexual Abuse
1977	1,045	Not available
1978	1,762	Not available
1979	1,147	Not available
1980	719	249 (34.6%)
1981	803	281 (34.9%)

As will be discussed subsequently,[24] however, these figures must be used with great caution.

The Office of the Official Guardian, a Branch of the Ministry of the Attorney General, is responsible for the legal representation of children in child welfare proceedings. In the initial two years of the program, from February 1, 1980 to January 31, 1982, representation for children was completed in 4,823 cases across the Province. In 1,340 cases (27.8%), allegations of abuse were made. In 308 cases (6.8%), the allegations included sexual molestation. (See Appendix G). It should be remembered, however, that lawyers for children are only appointed if proceedings are commenced in Family Court. As will be discussed later, it is likely that the majority of cases involving sexual abuse do not go to Family Court.[25]

e. Protection for 16 and 17 Year Olds

The statistics of sexual abuse do not include incidents of abuse reported by young people over 16 years of age. Under The Child Welfare Act, a person can only be brought before the Court as "a child in need of protection" if she is actually or apparently under the age of 16 years.[26] An adolescent who has not been involved with a Children's Aid Society prior to her sixteenth birthday is effectively deprived of any protective services thereafter. Although she theoretically could receive voluntary services from a Society, the statutory age of 16 is generally applied as the maximum limit for eligibility. (If she is an expectant mother or a single parent, of course, she may qualify for services on behalf of her child).

This "legal limbo" which afflicts 16 and 17 year old adolescents is particularly tragic in sexual abuse cases. It is not unusual for the existence of ongoing sexual abuse to become known only when the child is a maturing adolescent. A teenager subjected to an ongoing pattern of sexual abuse will often leave home at 16 years of age, whether she wants to or not, primarily to escape the abuse she has endured. Others will remain at home in a dependency relationship, helpless to remedy the situation. Their lack of legal recognition, and their lack of access to protective services, is a major problem which needs to be addressed.

2. Investigation

Substantial efforts have been made since 1978 by both the Police and the Societies to develop joint procedures for handling child abuse cases.[27] It is clear, however, that the C.A.S. and the Police have not yet found a mutually-satisfying, complementary way of investigating these cases.

a. C.A.S. Concerns

- Some C.A.S. workers are concerned that the Police will not attend on an initial investigation. Some Police apparently want the C.A.S. to take initial steps to determine that the complaint is legitimate before they become involved.

- The C.A.S. is required to "initiate the investigation within an hour". The Police, depending upon the nature of the allegations, do not always consider sexual abuse a priority. This makes joint interviews and investigations problematic.

- C.A.S. workers who make the first contact with the victim and her family are unsure as to their immediate role when the Police take over the investigation. At the Police station, for example, what is the social worker to say to the father while he is waiting to be questioned by the Police?

- Several C.A.S. staff expressed the desire that the Police should conduct the preliminary investigation entirely. Some also expressed confusion regarding the role of the Youth Bureau versus the Criminal Investigation Bureau in these cases.

- C.A.S. staff are also concerned that if, on the immediate circumstances, the evidence is unclear or problematic, the Police are less inclined to be the primary investigator and tend to leave the investigation to the C.A.S. If the Police back off, the family usually wants the C.A.S. to back off as well. This makes any kind of investigation (or follow-up counselling) very difficult.

- C.A.S. workers may know that the Police have been involved with a family on an earlier occasion. Because all incidents are not reported to the C.A.S., however, they subsequently are unable to identify specific Officers who could be called as witnesses in Family Court.

- C.A.S. workers also indicate that the Police appear reluctant to pursue complaints which arise in the context of a separation or legal proceedings for divorce, custody or access. This causes problems for the C.A.S. who do not have the same resources for a proper investigation.

b. Police Concerns

- The C.A.S. are not geared to respond to the immediate demands of an offence reported after hours or on the weekend.

- Some Officers want the C.A.S. to determine that a complaint is legitimate before Police are involved. Others want a separate investigation from the beginning so that they can get "the big picture" before confronting the alleged offender.

- As the Police rely on the element of surprise in assessing the credibility of an offender, they are most anxious that the C.A.S. not "tip off" the offender. The Police, therefore, do not want to confront the accused in the office of a C.A.S. worker.

- To prevent disclosure to the offender, the Police do not want the C.A.S. to report cases to the Child Abuse Register until the investigation is completed.

- If there has been no ongoing relationship between the C.A.S. and the family, the Police want the C.A.S. to maintain their distance during the Police investigation.

- Notwithstanding presentations about what the Police need in these types of cases, the C.A.S. do not generally have the necessary investigative training. Different perceptions of role, and different legal requirements may account for what the Police perceive to be deficiencies in C.A.S. investigation skills.

- Problems about conflicting expectations and stereotypes occur most frequently between younger social workers and uniformed Police Officers.

- To plan for the family, C.A.S. workers want the Police to predict the outcome of the criminal proceedings. The Police find this an impossible expectation.

- C.A.S. workers often wish to discuss the case with the Police two or three weeks after the occurrence. The Police, however, must decide whether ot not to lay charges relatively soon. To be useful in that decision, joint consultation on individual cases must occur immediately after the offence is reported and investigated.

Clearly, joint investigations at present produce many problems from the perspective of both the Police and the Societies. If effective inter-agency co-operation is to become a reality, clear protocols must establish what is reported, who is the prime investigator, how joint interviews are structured, and when case consultation is to occur.

3. Relations with the Police

a. Disclosure

Where personal relationships exist, there is considerable exchange of information informally between the Police and the C.A.S. This is particularly true between the C.A.S. and the local Youth Bureau. The Police, however, express concerns about their lack of access to C.A.S. files. Where the worker is available, M.C.A.S. policy requires that information in the files be shared with the Police. After hours or where the worker is not available, this information is inaccessible, for M.C.A.S. policy also specifies that files themselves are available only by subpoena after criminal proceedings are commenced. In the view of the Police, this is "too late" and "after the fact". They could do a more comprehensive investigation and make a better judgement on the credibility of the complainant, if these files were available before the decision about charges is made.

b. Use of Family Court

C.A.S. social workers feel that sometimes the Police are anxious to use the Family Court as a "fishing expedition" to get further evidence for criminal charges. The Police, on the other hand, are concerned that they are subpoenaed to appear in Family Court only at the last minute, and without adequate consultation as to the information which the Police can provide. Often, Police memo books do not have the kind of information which the C.A.S. needs or wants.

c. Police in the Family Court Process

The Investigating Officers are considered key witnesses in any sexual abuse case which does proceed to trial. Some counsel for the C.A.S. talk with the Officers in advance of Court, if possible. One C.A.S. counsel indicated that "rapping" with the Police greatly increased his appreciation of the total context. The Police were seen as "more realistic" re the potential for criminal proceedings, had good insight into the family and its history, and were aware of risks to which the family may be exposed. Their "common sense approach" and their "opinions" were highly valued. Other C.A.S. counsel, by contrast, were quite concerned that the C.A.S. not seek a specific recommendation from the Police. To do so may subject the protection mandate of the agency to the law enforcement perspective of the Police.

4. Effect of Laying Criminal Charges

The single most outstanding complaint is the extent to which parallel proceedings in Family Court and Criminal Court causes the child to "sit in limbo" pending the resolution of the criminal charges. Defence counsel typically advise their clients to deal with the criminal matter first. "Who will go first" often becomes a tactical game between the Crown and the C.A.S., resulting in lengthy adjournments. The Family Court Clinic will not take a child welfare assessment referral as long as criminal proceedings are pending. Some Family Court judges will not make a disposition order until the criminal matter is resolved. The argument appears to be that custody and access cannot be determined until it is known whether the father will remain in the home or not. Notwithstanding the mandate of The Child Welfare Act, the "best interests" of the child in a rapid resolution of the issue appear to be ignored.

A few judges will proceed regardless. They argue that the criminal proceeding is not relevant, the burden of proof in Family Court is different, the father is not prejudiced by going ahead, and the child is clearly prejudiced by delay. Although these arguments are to be preferred, this approach occurs in relatively few cases. C.A.S. workers indicate that a more "consistent pattern in recent incest cases" is that once the incident is exposed, the father and mother join together against the girl, she expresses a desire to leave home and is taken into care. Alternatively, the child is taken into care in the heat of the immediate crisis, then the father and mother unite against her and she remains in care. The girl then "sits in limbo" pending the resolution of the criminal charges. The delay is a terrible burden on the child. She has to cope with the pressure of being "key witness" in a pending prosecution, as well as the dislocation and uncertainty of an interim foster care or group home placement.

The laying of criminal charges also accentuates the adversarial nature of the Family Court proceedings. Defence counsel discourage the father from talking to the C.A.S. without counsel present. The father may claim the protection of The Canada Evidence Act S.5 and The Ontario Evidence Act S.9, so that he may refuse to answer questions or, alternatively, be assured that answers given after claiming the protection cannot be used against him in subsequent proceedings. The wife could also claim that she is not "compelled to disclose any communications made to her by her husband during marriage"[28] in a child welfare proceeding. The result is that the informal discussions and negotiations which characterize C.A.S. actions before the Court become difficult. The atmosphere becomes particularly litigious if the father has a criminal lawyer acting in Family Court, or if the father has several lawyers retained in parallel child welfare, domestic and criminal proceedings.

Follow-up after criminal charges are laid is another difficulty. C.A.S. social workers do not understand the criminal system. They have no contact with the Crowns and are dependent on the Police to keep them informed as to what is happening. When this is not done, or when the criminal process is delayed interminably, C.A.S. workers feel themselves paralyzed. They feel that they cannot plan for the girl or her family, nor can they provide effective support for them vis-a-vis the criminal system.

Another concern is that criminal charges may be dropped because of plea discussions or the offender's agreement to get treatment. When the offender does not follow through, the onus is on the victim herself to relay the charges. This seldom happens.

If the focus is to be on the well-being of the victim, the existing gap between the criminal justice and the protection system must be overcome. A common philosophy, joint investigations, mutual consultation and ongoing communications will help. Most important, however, child protection authorities and Courts must address the best interests of the child as soon as possible. S.1(b)(vii) of The Child Welfare Act expressly requires that "the effect upon the child of any delay in the final disposition of the proceedings" be among the considerations in determining the "best interests of the child". The outcome of parallel criminal proceedings can always be the basis for a subsequent status review.

5. Use of Family Court

a. Extent of Court Intervention

An alarming result of our survey is the extent to which sexual abuse cases are not brought to Family Court. Where the abuser is out of the home, and the mother appears to be caring for the child, the normal response is to provide services to the girl and her family on a voluntary basis either directly or by referral to another agency. Even where there are concerns about the parenting skills of the mother, or the effect of voluntary treatment, still the preferred approach appears to be to provide "continuing supervision" without recourse to the Court.

Our survey of 1980-1981 M.C.A.S. records indicates that cases were handled in the following manner:

		Cases	%
1.	No court intervention	51	73.9%
	Continued, voluntary supervision	34	49.2%
	Referral elsewhere	8	11.5%
	Victim moved to another placement	3	4.3%
	Case closed at intake	1	1.4%
	Voluntary care by agreement	5	7.2%
2.	Court Proceedings	16	23.1%
	Order to produce	2	2.8%
	Apprehension	7	10.1%
	Status review	3	4.3%
	Access application	1	1.4%
	Unclear	3	4.3%
3.	Other	2	2.8%
	Assailant admitted to C.A.S. care	1	1.4%
	Not included in record	1	1.4%
	Total	69	

b. Factors Affecting the Decision to Proceed

The records indicate that a variety of factors influence the decision of a worker not to proceed to Court. These factors, noted in descending order of mention in the records, are:

	Number of Cases Where Specific Factor Mentioned	As % of Cases Where no Court Intervention or Voluntary Agreement
Abuser out of home	11	23.9%
Abuser not a member of family	8	17.3%
Parents separated	5	10.8%
Parental co-operation in therapy	5	10.8%
Prior C.A.S. involvement	4	8.6%
Wishes of child	4	8.6%
Victim out of home	2	4.3%
Victim over 16 years	1	2.1%
Parents caring and aware	1	2.1%
Inter-agency conference	1	2.1%
Total	42	90.6%

The efficacy of these factors as predictors of the safety of the child, however, is open to question. The abuser may be out of the home for the moment. There is no guarantee that he will not return. Charges may not be laid, or may be withdrawn. "No contact" bail conditions may be unenforced or even revoked. A failure of parental supervision may have permitted opportunities for abuse within the family or by outsiders. Co-operation of the family in therapy may be more illusory than real, and the wishes of the child may reflect internal family pressures.

c. "Continuing Supervision"

There is no indication from the M.C.A.S. records as to what "continuing supervision" means. 29 The facts of selected cases, however, raise serious concerns as to the wisdom of supervision in lieu of greater Court action.

- In one case (3½ year old fondled by uncle), the worker did not question the child because of her age and disturbed state.
- In another, (11 year old fondled by father), the father admitted to the actions and remained in the home after charges were laid. The C.A.S. provided "close supervision" to ensure follow-through with therapy. When this broke down, the parents separated and the mother refused any further C.A.S. involvement.
- In another, a 15 year old girl alleged molestation by her step-father who had a prior criminal record for indecent assault (reduced from carnal knowledge, buggery and rape). The step-father and the mother denied the allegation and no charges were laid. The girl wanted to be placed with the agency. After a lengthy interview at the Police station, she and her younger brother were returned home. The step-father agreed to recontact the Clarke where he had gone for treatment previously. The family was to have an assessment. The worker notes that if the

parents fail to co-operate "will consider Court action".

- In another case, a father admitted to fondling his five daughters over an eight-year period. The family was "significantly affected by the agency intervention", were unwilling to press charges, and no charges were laid. Although the family indicated to the Police that they were willing to seek treatment, the M.C.A.S. worker noted the reluctance on the part of all family members to participate in counselling. The worker thought it questionable "how effective treatment would be", but initiated no Court proceedings.

d. An Alternative Approach

Many C.A.S. social workers, C.A.S. counsel and lawyers for children, were of the opinion that even where the abuser is out of the home, the present tendency towards voluntary services should be replaced by a finding and Court-ordered supervision. This would have several advantages over the present practice:

- The formal finding at Court would be a confirmation to the child that she is believed and society will protect her.
- The finding enables the judge to compel an assessment of the child and the family.
- The Order provides some leverage by which conditions can be enforced. At a minimum, the case can be brought back before the Court for review.
- A Court proceeding initiates the mechanisms by which independent counsel is available for the child. The victim can have her own advocate for the child welfare proceeding, including any negotiations leading to a Consent Order. The independent counsel may also be available to act as a support in the criminal justice system.
- The Supervision Order provides a measure of accountability for the parent and for the agency, ensuring that their plans are

subject to review at a subsequent hearing. This puts greater pressure on the parents to adhere to any treatment plans, and on the agency to ensure that their plan meets the "best interests" of the child.

- The legal handle on the family helps avoid denial, deviation and moving away.

The delay shown by Tator and Wilde to exist in Family Court proceedings [30] is a positive disincentive to Court intervention. This may be overcome by settlement procedures, consent orders and, where trial is necessary, by according such cases a priority in Court dockets. Court dockets are in the control of the agencies and could be adjusted as required. Training Family Court judges in the philosophy and resources of the integrated response to sexual abuse would also encourage a more speedy resolution of the issue.

6. Protection Proceedings

When protection proceedings for sexual abuse are commenced, very few actually proceed to trial. The social and political connotation to allegations of sexual abuse puts pressure on the family to consent to whatever is proposed. Often, a Supervision Order or Society Wardship can be obtained on consent. If the family is reluctant to proceed and willing to consent, minimal evidence as agreed between the parties, will be put before the Court. The desired disposition can be secured without the judge knowing the severity of the circumstances and without the need for the offender to acknowledge responsibility for his actions.

Another typical approach is to obtain a finding on the basis of "other concerns" besides the sexual abuse. Where the indicators of sexual abuse are only "clues which raise suspicion", the C.A.S. does not specifically allege sexual abuse but uses S19(2)(b)(xi) of The Child Welfare Act as a basis for intervention. The agency may indicate that it has "some concerns" about the nature of the father/child relationship, or suggest that the family attend for an assessment at the Family Court Clinic. Some judges pick up on these clues and may speak to the child directly. Others prefer to read in other grounds for intervention.

Another reason for this "understated" approach to sexual abuse is the increasing concern of C.A.S. counsel with the problems of proof. Although the burden of proof in child welfare proceedings is the balance of probabilities, the increasingly legalistic nature of Family Court proceedings appears to require a higher standard. Legal representation for parents, more legalistic judges, the threat of costs being imposed on the agency, tighter rules of evidence, and more appeals, all put pressure on C.A.S. counsel not to raise allegations of sexual abuse without strong and substantial evidence to prove their case. Where photos, medical evidence, the testimony of doctors is available, and other strong corroborative evidence exists, "sexual abuse" will be alleged explicitly. Where such evidence is not present (as is more typically the case), the C.A.S. will proceed on the basis of other concerns.

This trend in Family Court led one C.A.S. counsel to conclude that child welfare proceedings may be a "dead end". Without a clear finding of sexual abuse, and a public acknowledgement of responsibility by the father, the denial continues and effective treatment is undermined. So long as the finding is based on "other concerns", the Family Court collaborates in the continuing disbelief of the victim.

To reverse this tendency, sexual abuse should come out of the closet. Voluntary agreements should give way to Court-ordered supervision after a finding. Allegations should be explicit, based on the more sophisticated "indicators of sexual abuse" which the M.C.A.S. has already identified, and supported by expert testimony if necessary. Where consent orders are obtained, they should be conditional on the family and victim agreeing that all the evidence be put on the record.

7. Disposition

It is difficult to generalize as to dispositions, based as they are on a host of "concerns" within the circumstances of each individual case. Unless the child desires otherwise, however, the most common initial disposition appears to be a Supervision Order with the child returned to her home in the custody of her mother. Where the father is out of the home, the Supervision Order may be coupled with a "no access" or "supervised access" order against the father. In isolated cases, a "no access" or "supervised access" order against the father is the only outcome of the proceeding.

Our survey of M.C.A.S. records indicate that of sixteen cases referred to the Court, the initial disposition was as follows:

Supervision	9	56.2%
Society wardship	3	18.7%
Crown wardship	1	6.2%
No access order	1	6.2%
On adjournment	2	12.5%

These results are significantly different from the ultimate disposition of sexual abuse cases brought to Court across Ontario in the two years covered by the Official Guardian's statistics. Of the 308 cases in that sample, the ultimate disposition was:

Society wardship	36.4%
Supervision	34.9%
Withdrawal	14.0%
Crown wardship with access	9.3%
Crown wardship no access	4.8%

The Tator - Wilde statistics on the actual disposition of all child abuse cases referred to the Metropolitan Toronto Court indicated:

Society supervision	32.1%
Crown wardship	27.6%
Society wardship	22.6%
Withdrawal/transfer	9.4%
Other	8.5%

Our survey clearly indicates at least an initial predisposition in the Metropolitan Toronto Courts towards supervision orders. The few cases in our sample and the limited nature of the reports from which we drew our findings may have skewed our results. The other available statistics, however, show ultimate dispositions as opposed to that initially obtained in the proceeding. A complete follow-up on even our sample may well indicate that supervision orders in some cases ultimately give way to more severe intervention.

8. Supervision Orders

S.30(4) of The Child Welfare Act enables a Family Court judge to attach "terms and conditions relating to the method of supervision of the child". The narrow bounds of the statutory language impose severe constraints on the powers of judges to protect the victim in these types of cases. Some judges will order that the abuser is to remain out of the home or that the child is not to be left alone with the abuser. Such orders are usually made, if at all, only with the consent of all parties. Where no such order is made, and the abuser remains in the home, problems generally persist and the child ultimately expresses a desire to be brought into care.

S.30(4) of The Child Welfare Act also poses problems with a judicial condition ordering treatment. S.29 of The Child Welfare Act specifically empowers a judge after a finding to order a child, a parent or "any other person", to attend for an assessment. There is no specific provision, however, empowering a Court to order treatment. Some judges will make continued counselling or treatment a condition of the supervision order. Should the treatment plan collapse, the case can be brought before the Court for breach of the condition. Other judges, however, interpret S.30(4) narrowly, refuse to order conditions which do not relate to the "method of supervision", and at best will make a note on the record that treatment is recommended.

9. Assessment

a. Extent of Assessment

The Official Guardian's statistics provide some indication of the extent to which assessments take place in Court proceedings concerning sexual abuse. Of the 308 cases across Ontario during the two years of the sample, assessments were performed in 47.2% and not performed in 52.8% of cases. Assessments were ordered by the Court in 22.4% of the cases. It is interesting to note, furthermore, that the assessment was of the child and the parents in 25.7% of the cases, of the child alone in 17.6% and of the parent alone in 3.9%. No statistics are available as to the use of assessments in Metropolitan Toronto alone.

b. Family Court Clinic

The experience of the Family Court Clinic is that one-third of their child welfare assessments are S.29 referrals; two-thirds are on consent before a finding. Where the father refuses to consent, there is no power to order a family assessment until after the finding.

The Family Court Clinic has a policy not to assess for child welfare disposition purposes so long as criminal charges are pending. They argue that until the criminal matter is resolved, they do not know the facts on which future placement will be based (i.e. accused jailed or in the home, pressures on the mother). This is a major impediment to action in the Family Court, however, and contributes to the limbo imposed on the child and the frustration experienced by the C.A.S. workers.

The Family Court Clinic, nevertheless, expresses an interest in more involvement with crisis counselling and assessment of victims in sexual abuse/assault cases. They would take, for example, direct referrals from the Police, the C.A.S. and Probation, and provide immediate crisis counselling to the victim. At present, the Youth Bureau makes some direct referrals of highly disturbed children under seven years who are involved in sexually aberrant activity. The Family Court Clinic does not get referrals from the Police of children molested by adult offenders. It is the perception of Clinic staff that the Crowns do not want the Clinic to "muck around with the child's head". Defence counsel are also generally opposed to involvement of the parents with the Clinic at this stage.

There is some inconsistency in the Family Court Clinic perspective. If the Clinic is serious about its desire to provide crisis counselling for victims, it must reconsider the policy which presently inhibits the C.A.S. and the Police from using its facilities.

At present, some Family Court judges make extensive use of the Clinic for assessment and recommend treatment. Others make no referrals whatsoever. Use of the resources appears to depend on the perspective of the individual judge.

The Family Court Clinic, at any one time, will have 30 families out of a total 250 in treatment for problems of sexuality generally. The Clinic, however, has no immediately accessible statistics on sexual abuse or incest. "Reasons for referral" are gross only, referring to delinquency, custody and child welfare. References to "sexual assault" also refer to attacks on other children. References to "incest" are contained only in the caseload files.

10. Counsel for the Child

The independent representation program has already been described.[31] Where counsel have been provided for children in child welfare proceedings, there is precedent for the same lawyer being appointed to assist the child in subsequent criminal proceedings.[32] Where sexual abuse cases do not even go to Family Court, however, the child is deprived of access to an independent legal advocate.

S.20 of The Child Welfare Act enables the child to have representation "at any stage of the proceedings under this Part". Presumably this also applies to the negotiation of a voluntary care by agreement (under S.25). Indeed, S.25(8) requires the consent of a child twelve years of age and over to such an agreement. As a practical matter, however, there are few referrals for independent representation at this stage. It may be argued, furthermore, that where voluntary services alone are contemplated, there is no precise statutory requirement that independent representation be considered. The reality again is that the issue does not generally arise at this stage.

Given the benefits of independent representation to the child, it might be advisable to insist that all victims of sexual abuse be referred immediately for independent representation. This would enable the child to have an advocate at the earliest possible stage in both family and criminal proceedings. To the extent that the lawyer can develop a trusting relationship with the child, the wishes of the chid may be more clearly heard.[33]

C.A.S. social workers also find the presence of independent counsel very helpful if criminal charges are laid. In their view, the role of the agency in criminal proceedings is not clear. Counsel for the child can better liaise with the Crown and defence attorneys, and can better explain the nature of the Court process to the child.

11. The Child in Family Court

A child ten years of age and older is entitled to be present at a hearing "unless the Court is satisfied that the effect of the hearing or any part thereof would be injurious to the emotional health of the child".[34] The Official Guardian's statistics are instructive as to the extent of the child's participation in sexual abuse proceedings. In 62.7% of cases, the child was present throughout the hearing; in 9.6% s/he was excluded part of the time; in 27.8% s/he was excluded entirely.

There is tremendous pressure on the child at Family Court. There is no witness room and the child is petrified to confront her father in the lobby. When the docket is lengthy, there may also be considerable delay before the case comes before the Court. The atmosphere of Family Court, the proximity to her father and the delays, compound the child's antipathy to the process.

There is seldom any need for the child to take the stand in these cases. Evidence is usually put in through the social workers, Police, psychological and medical reports. Statements of the child made to the social worker are admissible, as the child is considered a party to the proceedings. Occasionally, the judge may speak to the child in chambers. This occurred, however, in only 8.7% of the 308 cases where the Official Guardian provided independent representation for the child. Although counsel for the parents could call the child for cross-examination, this occurs rarely. When it does, Courts are particularly careful to ensure that the child is not harassed.

12. Follow-Up

Many workers are often uncomfortable with sexual assault cases and particularly with incest. Most have had no professional training about sexual abuse as distinguished from child abuse generally. The quality of services or supervision provided to the victim and her family varies with the workers and the contingencies of a competing caseload. The workers express real concern about the difficulty of "getting into" the family. Although they try to keep a "watching eye", they cannot work with the families in any sustained, aggressive manner.

It has been estimated, for example, that proper treatment requires at least two years, at intervals of at least once a week. For every clinical hour, two additional hours may be necessary for administration, preparation and consultation. This means one-half day per week per family, or a commitment of one-tenth of one worker's time for two years on each family. This means that no worker should carry more than ten cases, although the reality is caseloads of thirty to thirty-five per worker. Since transfers of these cases are difficult, continuity of staff is highly important. Clearly, C.A.S. workers do not have the time, nor the continuity, for so sustained an effort.

The result is that "continuing supervision" becomes an euphanism for relative inaction. It is striking, for example, how many sexual abuse cases occur in the context of families already involved with the C.A.S. Although these statistics are impressionistic (based on Form 6 reports to the Register and fragmentary references in M.C.A.S. internal abuse reports), it appears that at least 22 cases of the 66 in our sample (or 33%) occurred in families already reported to the M.C.A.S. and subjected to agency evaluation and/or supervision. Four of the cases arose within foster families in the employ of the agency.

13. Provincial Child Abuse Register

a. Extent of Reporting

There is a developing opinion based on the experience in other jurisdictions and the initial experience under the new Ontario legislation, that the Child Abuse Register is not fulfilling its function.[35] Our research supports that conclusion.

Our sample from the M.C.A.S. clearly illustrates the "filtering out" process which occurs. Of 66 cases in our sample, only 57% (37 cases) were reported to the Register. The actual number of cases reported to the Register from M.C.A.S. during 1980-1981 were 41 out of 79 reported incidents, or only 51.8% of the total. The 41 reported sexual abuse cases represent 36.2% of the total verified and reported child abuse cases from the Society.

The C.C.A.S. of Metro Toronto reports a "disturbing trend towards increased child abuse" to the extent that 119 children or 11.1% of the total admitted to care as of March 31, 1982, were admitted for reasons of child abuse.[36] Yet cases of child abuse reported to the Register 1979-1982 were as follows:

	All Child Abuse	Sexual Abuse	Incest	Sexual Molestation
1979	134	20 (15%)	7	13
1980	72	19 (26%)	2	17
1981	80	36 (45%)	9	26
1982(to June 28)	29	9 (31%)		

b. Verification of Suspected Abuse

Both protection Societies in Metro Toronto have a clearly-defined procedure for the verification and reporting of child abuse to the Register. The Ministry of Community and Social Services has established minimum standards for the verification of suspected abuse. [37] "Verification" must be sufficient to establish, in a subsequent expungement hearing, that the C.A.S. had reasonable grounds to believe that child abuse did occur. [38] Findings of Court proceedings are not necessarily relevant to reporting to the Register. A report can be based on "credible evidence that the abusive incident took place". This is a considerably lower standard than criminal proof beyond a reasonable doubt or the civil balance of probabilities test.

c. Reasons for Non-Reporting

The "filtering out" process by which incidents of sexual abuse are not reported to the Register begins at the earliest stages of responding to the complaint and continues to occasions when the Register itself rejects occurrences which the Society wishes to report. This occurs as follows:

- The C.A.S. does not normally receive reports of abusers who commit sexual assault outside the family. These cases are processed through the criminal justice system as "assault", "rape", etc., without the Police ever reporting the incident to the C.A.S.

- The practice of social workers varies. Some report for internal verification all incidents of abuse; others report only those which they feel are reportable. The filtering process thus starts at the level of the front-line worker. If the incident was an isolated incident, or occurred many months or years previously, it may well not be reported depending on the perspective of the worker.

- The possibility of an expungement hearing puts great pressure on the agency to ensure that the report can be verified in a subsequent hearing. The problems of proof inherent in verifying sexual abuse are a particular deterrent to reporting these types of cases. In the first year of operation of the new Register, there were 40 requests for expungement. [39] To date, the M.C.A.S. has had six expungement hearings, including one related to allegations of sexual abuse.

- Reporting to the Register is sometimes delayed at the request of the Police to prevent notifying the suspect of the ongoing investigation. Reporting to the Register, however, is not dependent on the laying of criminal charges. In our sample of 66 cases, there were 17 cases (25.7%) verified to the satisfaction of the agency but where no criminal charges were laid. There were four cases not reported to the Register where criminal charges were laid. Two involved foster fathers, one an uncle, and the other a neighbour.

- Some categories of cases are as a matter of Register policy not reportable:

    - Where the abuser does not have an ongoing "caretaker" relationship with the child (e.g. a stranger, an uncle, a family friend, a neighbour). The Register has adopted a narrow definition of "caretaker" and routinely rejects reports submitted on abusers from outside the family.

    - Where the alleged abuser is a juvenile.

    - Where the abused child is now over 16 years of age.

d. Expungement Hearing

The possibility of an expungement hearing imposes an additional burden on the victim of the abuse. A hearing is subject to The Statutory Power Procedures Act. [40] The alleged abuser has the right to counsel, to subpoena and cross-examine witnesses. It is not unusual, therefore, for the abuser's lawyer to want to cross-examine the child. The M.C.A.S. on at least one occasion has reluctantly consented to removal of the abuser's name from the Register rather than have the child subjected to another hearing.

> On other occasions, the referee has requested prior notice if a child is to be a witness, and consideration as to legal representation for the child.

IV. Proposed Omnibus Legislation

The forthcoming consultation process to be initiated by the Ministry of Community and Social Services around the proposed omnibus legislation for children's services provides an opportunity for law reform relevant to several problems which we have identified. These include the need for:

- a statutory definition of sexual molestation in The Child Welfare Act. For reporting purposes, this should include all occurrences, regardless of the relationship of the assailant to the victim;
- an amendment to S.30(4) of The Child Welfare Act so that "terms and conditions" of a supervision order are not restricted to the "method of supervision";
- an amendment to The Child Welfare Act to specifically empower Provincial Court judges to a) order treatment of the child, family and abuser, and b) order an abuser to be removed from the home;
- an immediate evaluation of the Provincial Child Abuse Register, including a review of policies limiting reporting and reconsideration of the right to an expungement hearing.

Other problems which we have identified will require changes in agency policies, procedures, and, most of all, attitude. Protection of the child victimized by sexual abuse requires concerted action by all relevant agencies. It also requires an honest appraisal of the services now provided and of possible alternatives.

FOOTNOTES

1. Michelle D'Iorio, "Father-Daughter Incest: Outcome and Management", Paper presented for Diploma on Child Psychiatry, University of Toronto, February 1, 1978.

2. *Ibid*, P. 21.

3. *Ibid*, p. 22.

4. *Ibid*, p. 22.

5. *Ibid*, p. 23.

6. *Ibid*, p. 25.

7. Macrina Donovan, "Sexual Assault of Children Under Twelve Years of Age", Dissertation for Master of Arts in Criminology, University of Toronto, October 1978.

8. *Ibid*, p. 44.

9. *Ibid*, pp. 106-107.

10. *Ibid*, p. 163

11. *Ibid*.

12. *Ibid*, pp. 177-178.

13. Joan Tator and Katharine Wilde, "Child Abuse and the Courts: An Analysis of Selected Factors in the Judicial Processing of 'Child Abuse' Cases", 3 *Canadian Journal of Family Law* (1980), 165-205.

14. *Ibid*, p. 187.

15. *Ibid*, p. 194.

16. *Ibid*, p. 197.

17. *Ibid*, p. 196.

18. *Ibid*, p. 197.

19. *Ibid*, p. 194.

20. *Ibid*, pp. 184-185.

21. M.C.A.S. Policy Manual 01.07.00, cf. Ontario Ministry of Community and Social Services, Children's Services Division. *Child Abuse: Guidelines for Reporting to the Registrar*, February 1981 where *sexual molestation* is to be reported "if *sexual activity* has occurred or is occurring between an adult and a child." p. 5.

22. See pp.45-46.

23. Compare pp.57-58. The figures cited there are a "guess-estimate" based on the relationships reported and those that can be inferred from the facts of the case. Where the relationships are actually indicated on the record (124 cses), the breakdown is as follows:

		% of Known Relationships
Acquaintance	33	(26.6%)
Stranger	31	(25.0%)
Father	15	(12.0%)
Family friend	10	(8.0%)
Boyfriend	9	(7.2%)
Brother/uncle/cousin	7	(5.6%)
Stepfather	6	(4.8%)
Common-law partner	6	(4.8%)
Babysitter	5	(4.0%)
Foster father	2	(1.6%)
Total relationships indicated in Police record	124	
Relationships not indicated in Police record	29	
Total:	153	

24. See pp. 41-44.

25. See pp. 30-31.

26. The Child Welfare Act, R.S.O. 1980, c.66, S. 19(1)(a).

27. See p. 2.

28. The Ontario Evidence Act, R.S.O. 1980, c.145 S.11.

29. See the conclusions of D'Iorio and Donovan re. the absence of appropriate sexual assault management programs, the lack of family therapy and of follow-up. pp.17-19.

30. See pp. 19-20.

31. See pp.5-6.

32. See pp.74-77.

33. The role of the child's lawyer has been the subject of considerable debate. The preferred position, however, is that of the Law Society of Upper Canada to the effect that, where the child has capacity to give instructions, the lawyer should advocate the wishes of the child and maintain in strict confidence all communications received in the context of the solicitor-client relationship. Where the child lacks such capacity, the lawyer is to act as a guardian. Report of the Professional Conduct Sub-Committee on The Representation of Children, adopted by the Law Society of Upper Canada Convocation May 1981.

34. The Child Welfare Act, R.S.O. 1980, c. 66, S.33.

35. Ross Dawson, "Rethinking the Child Abuse Register", Ontario Association of Children's Aid Societies, Journal, February 1982, pp. 1-5, 14.

36. C.C.A.S. Newsletter, Spring 1982, p. 3.

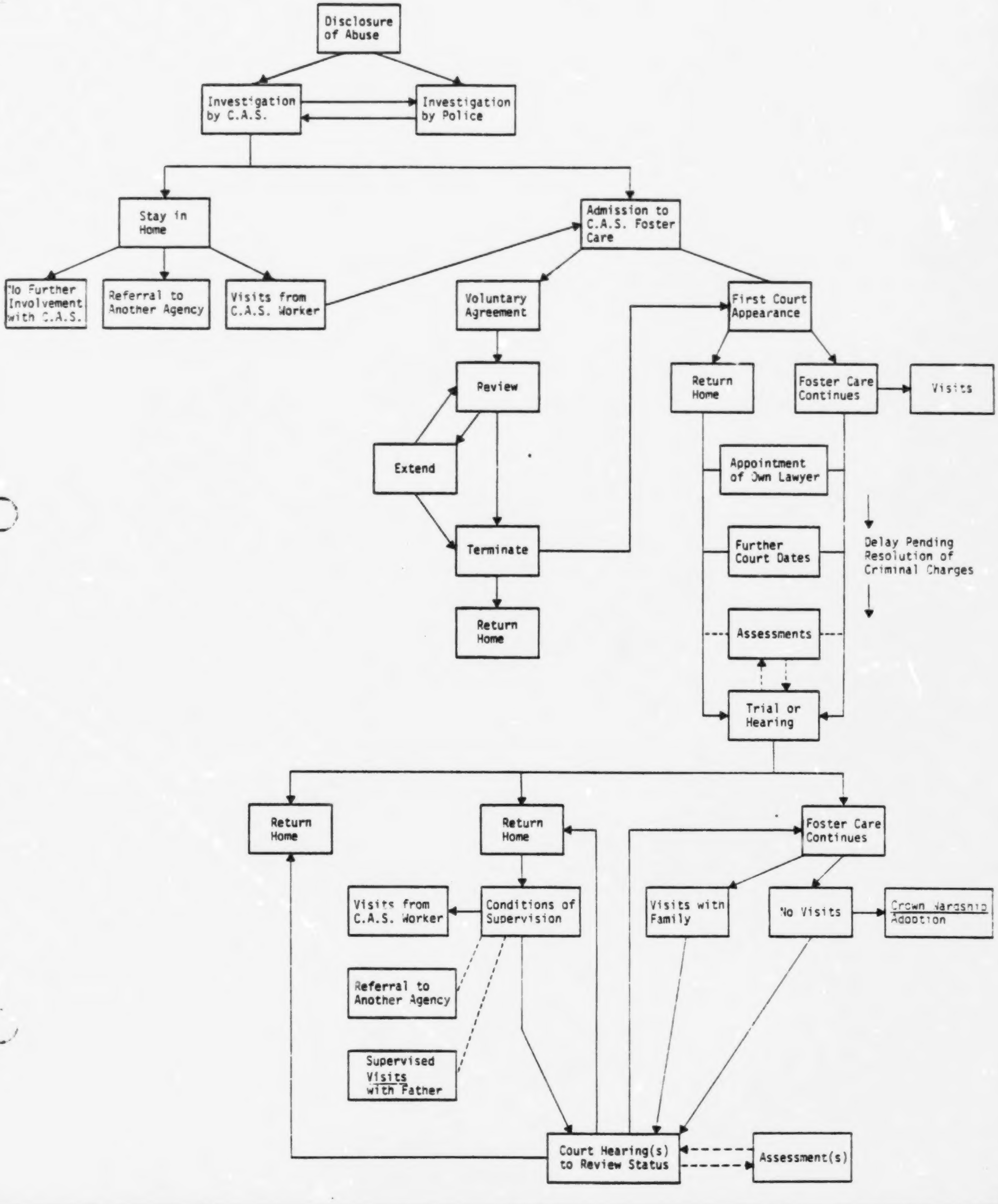
37. Ontario Ministry of Community and Social Services, Children's Services Division, Child Abuse: Guidelines for Reporting to the Registrar, February 1981.

38. Ibid, p. 7.

39. Dawson, footnote no. 34, p. 5.

40. R.S.O. 1980, c. 484.

FLOW CHART: CHILD WELFARE SYSTEM FROM THE PERSPECTIVE OF THE CHILD


Disclosure of Abuse
Investigation by C.A.S.
Investigation by Police
Stay in Home
Admission to C.A.S. Foster Care
No Further Involvement with C.A.S.
Referral to Another Agency
Visits from C.A.S. Worker
Voluntary Agreement
First Court Appearance
Review
Extend
Terminate
Return Home
Return Home
Foster Care Continues
Visits
Appointment of Own Lawyer
Further Court Dates
Delay Pending Resolution of Criminal Charges
Assessments
Trial or Hearing
Return Home
Return Home
Foster Care Continues
Visits from C.A.S. Worker
Conditions of Supervision
Visits with Family
No Visits
Crown Wardship Adoption
Referral to Another Agency
Supervised Visits with Father
Court Hearing(s) to Review Status
Assessment(s)

SEXUAL ABUSE AND THE CRIMINAL JUSTICE SYSTEM

I. Introduction

Criminal action against intra-familial sexual abusers has been cause for continuing controversy. The trauma of the Court process to the victim, the disruption of the family unit, and the need for treatment, are often cited as reasons for not pursuing criminal charges.

In recent years, however, there has been a change in perspective. Leading sexual abuse programs in San Jose, California, Seattle, Washington, and elsewhere in the United States, have increasingly adopted a strong pro-prosecution policy. From the perspective of the victim, criminal charges against the offender can have positive advantages. The offender, not the child, is removed from the home. Powerful investigation tools are mobilized to support the child. The offender who admits responsibility, or who is found guilty by a Court, relieves the child of her guilt. The legal process, and the sanctions provided by the Court, facilitate rehabilitation of the victim and her family. Most important, society shows that it believes the child and that it will protect her interests.

Such expectations from the criminal justice system can be achieved, however, only if the system is adjusted to accommodate the perspective of the victim. This requires an assessment of existing procedures and practices and, if necessary, the potential for change.

Unfortunately, there is virtually no empirical data available on how the criminal justice system in Metropolitan Toronto processes sexual abuse cases against children. The comprehensive study of rape done by Lorenne Clark and Debra Lewis (1977) focused on women over the age of fourteen. 1 The Committee on Sexual Offences Against Children and Youth, initiated in 1981 by the Federal Department of Justice and chaired by Dr. Robin Badgley, is still compiling its data from across Canada and will likely not report until 1983. Our research is an attempt to fill the gap in the interests of immediate policy development.

II. Reported Occurrences

Statistics provided by the Metropolitan Toronto Police Task Force Records Bureau indicate the extent of sexual offences against children under sixteen years reported to the Police in recent years. These are as follows:

	1977	1978	1979	1980
Indecent Assault:				
Female	299	298	354	322
Male	151	104	126	102
Total	450	402	480	424

	1977	1978	1979	1980
Rape	30	33	33	25
Attempt Rape	3	2	7	4
Sexual Intercourse:				
Under 14 years	28	36	19	26
14-16 years	10	10	13	15
Incest:				
Female	9	10	15	6
Male	-	2	-	1
Total	520	495	567	501

It is widely acknowledged that reported occurrences significantly understate the actual extent of the problem. Estimates in the literature indicate that 50%-75% of all sexual abuse is not reported to the Police. 2

By comparison with communities with established sexual abuse treatment programs, the reported occurrences in Metropolitan Toronto appear to be low. In Seattle, Washington, for example, there is a population of 1.2 million (less than half that of Metropolitan Toronto). In 1980, however, 730 children were referred to the Sexual Assault Centre and in 1981 there were 1,050 children. The San Jose, California program expects over 600 referrals in 1982 for intra-familial sexual abuse alone from a population half that of Metropolitan Toronto.

III. Investigation

1. Objectives

In sexual abuse cases, like any other criminal matter, the objectives of the Police investigation are multi-dimensional. The key questions to address are: Did an offence occur? Who is the offender? Is there sufficient evidence to secure a conviction? Does the victim have sufficient capacity to testify in Court?

The constellation of the family and the credibility of the complainant, as much as the concrete facts of the abuse which occurred, are prime factors for Police consideration. Their principal objective, however, is not to protect the victim, but to determine whether the criminal justice system can and should be mobilized against an offender.

2. Organization of the Police

a. Decentralized Structure

The Metropolitan Toronto Police are decentralized into Divisions, each responsible for the investigation and processing of crimes reported within their geographic catchment area. For administrative purposes, local Divisions are grouped into five Districts. The map, included as Appendix H, identifies the Police Divisions and Districts within the city. The decentralized structure of the Police means that each Division works somewhat differently, depending on the inclination of particular staff, the availability of existing resources, and the liaisons which have been established in the local community.

b. Assignment

Although there are individual Officers scattered throughout the Divisions who have established reputations as "experts" in sexual assault cases, there are as yet no specialized personnel assigned to handle these cases. The initial contact with the victim will generally be made by uniformed Policemen, assigned at random, depending on proximity to the source of the complaint. Thereafter, the investigation will be conducted by the Investigation Unit or the Youth Bureau. If the offender is an adult, the Investigation Unit is in charge. If the offender is a juvenile, the investigation is the responsibility of the Youth Bureau. Which specific Officers are assigned to the case depends on availability, and not on any specialized expertise in these types of cases.

Where the child has already been involved with the protection Societies, the C.A.S. worker typically contacts the Youth Bureau directly. Again, either the Youth Bureau or the Investigation Unit will take up the investigation, depending on the circumstances of the case and the availability of particular staff.

Female Police Officers are assigned to these cases, like any other, at random depending on availability. If the victim specifically requests to speak with a woman, special efforts will be made to have a Policewoman available. Generally, however, a male Officer who is non-threatening and supportive to the victim can establish a good rapport. Most victims do not request to speak to a woman.

c. Number of Officers

An initial obstacle for the victim is the number of Police Officers with whom she has to deal. The two uniformed Police Officers who respond to the initial complaint will conduct the initial interview and may accompany her to the hospital and/or the Police station. Thereafter, she will be turned over to at least two Investigating Officers and/or Officers from the Youth Bureau. It is not uncommon for both the Youth Bureau and the Investigation Unit to be involved, to interview the victim, take her statement, interview any complaint witnesses, and ultimately the accused. The process from the initial complaint to the time when the victim is allowed to return home from the Police station may take five or six hours. In that time, the victim may have told her story four or five times to as many different people.

3. Interviewing the Victim

The attitude of the first Officers on the scene is of primary importance. "Called upon to be a combination of priest, family counsellor, medical advisor, and detective", [3] their approach to the victim and her family sets the tone for the subsequent interaction. Uniformed Police Officers have some exposure in training to rape and to child abuse, but no specific knowledge or experience with sexual abuse. Typically, they determine the initial facts, take the child to the Hospital for Sick Children for a medical examination, and then refer the matter to the Investigating Officers.

One Investigating Officer, particularly experienced in sexual assault cases, prefers to have a preliminary talk with the victim at home, school, or the hospital, before any medical examination takes place. Ideally, he would take along the Officer in charge and a Policewoman if available, and then let the victim choose with which of the Officers she feels most comfortable. In an initial interview of twenty minutes or so, he seeks primarily to establish a rapport with the child, explaining a little about himself, the questions that will be asked, and the process which will occur. He finds it useful to be present at the hospital, to reassure the victim that he is around and to ensure that the victim's clothing and any medical samples are properly secured for forensic tests.

The victim's formal statement is usually taken at the Police station in the offices of the Investigating Officer or the Youth Bureau. This occurs as soon as possible after the medical examination, often in the middle of the night. Ideally, the Officer in charge of the investigation takes the statement, with his partner present to record what is said. Whether or not a parent is present while the child gives her statement depends on the child. A C.A.S. social worker may be present only in those instances where the child is already involved with the agency, and the report to the Police came through the agency. Taking a formal statement from the victim may take anywhere from twenty minutes to several hours.

The Police have no special resources available to facilitate communication by the child. Very small children will generally be interviewed at home. If the child is articulate, a statement may be taken there. If the child cannot, or will not, communicate, the Police generally assume that she lacks the capacity to testify.

In the United States, by contrast, sexual abuse cases involving very young victims are increasingly being investigated and brought to Court. In Seattle, Washington, for example, prosecuting Attorneys find that most children five years and up can testify, three and four year olds are more "iffy". [4] In Washington, D.C., prosecutors also find that, barring total paralysis, a child over four years of age should be able to be found competent in Court. [5]

A major problem does arise for the Police if they are unable to interview the child victim. Not infequently, the mother refuses to allow her child to talk to the Police on the grounds that the child must be protected from the trauma of further intervention. On occasion, this reflects her own concerns about her relationship with the alleged offender rather than the well-being of the child. Generally, the Police defer to the mother's wishes and drop the investigation. This practice raises concerns for the protection of the child. [6] Police records are sketchy and inconsistent as to whether the Police consider a referral to the C.A.S. in these circumstances. In some cases, intervention by the protection Societies may be highly desirable.

A similar problem arises if the Police seek to interview the child at school. School Boards do not have authority to permit the Police to talk with a child at school without parental consent. When the sexual abuse is initially reported to school authorities, and the parents are uncooperative, the Police may be helpless to pursue the matter. If the matter is reported to the C.A.S. and the C.A.S. apprehend the child, the Police then have an opportunity to talk with the child. Otherwise, they may be at an impasse.

4. Use of the "Public Mischief" Caution

In some cases the initial uniformed Officers or later the Investigating Officers caution the complainant as to her liability for a charge of public mischief. This is not a routine warning, but may be given where the Officer has some doubt, spots inconsistencies in the victim's story, or has a "sixth sense" about the victim's credibility. The Police are concerned that they "level with the girl", so that she knows the consequences of false accusations. There is also concern that valuable investigation hours not be wasted.

It appears, however, that use of the public mischief warning acts as a disincentive to the complainant, particularly when it occurs early in the investigation. Some complainants persist, others back off and prefer not to take responsibility for the Police pursuing the investigation. In the nine cases in our sample (5.8%) where the public mischief warning was noted on the record, charges of public mischief were laid against four complainants, rape charges were laid against accused in two cases, and three others were cleared as "unfounded".

Some Police Officers are concerned about the "tendency" of young people to recant their complaint. More experienced Officers are aware that recanting is not unusual in sexual abuse cases, [7] and that it should be seen as strong evidence supporting the truth of the original statement.

5. Extent of the Investigation

The nature of the investigation reflects the type of offence and the sophistication of the Officers in charge. In rape cases particularly, investigations are complex, time-consuming, involve hundreds of hours and extensive inter-action between the Police and the victim. To identify a suspect, the victim may view a line-up, examine school year books, visit Police headquarters to review photographs or to describe the assailant for the purpose of a composite drawing.

Incest, carnal knowledge and indecent assault cases, by contrast, are dealt with rather summarily. The Police generally interview the complainant, any complaint witnesses, and the suspect if he is identified. In a disturbing number of cases, however, a denial by the accused (and the mother or step-mother) ends the investigation. In equally disturbing situations, the Police do not interview an identified suspect. In incest cases in particular, the percentage of occasions when the Police do not interview the suspect is alarmingly high. In our sample of twelve incest cases, the records indicate no interview of the identified suspect in four cases, or 33.3% of the sample. Sometimes the whereabouts of the suspect are unknown. Other times, the reason for a failure to interview the suspect is nowhere recorded in the investigation reports.

The extent of the investigation appears to depend on the expertise and persistence of the individual Officers assigned to the case. At one extreme, a particular Police Officer investigated and ultimately secured a conviction against a brother who had engaged in verbal, physical and sexual abuse of his 16 year old retarded sister over several years. The abuse came out in the context of a "show and tell" class at school. The parents, however, refused to permit the girl to talk with the Police; the school had no authority to do so; and the Jewish Family and Child Service did not become involved since the child was 16. The Police Officer persisted, however, and ultimately secured a conviction on the basis of the brother's admission, notwithstanding that there was no complainant in the normal sense of the word.

At the opposite extreme, however, no charges were laid in one situation where a 22 year old sister was eye-witness to intercourse between her father and her 15 year old "slow learner" sister. It was the opinion of the Officers that the father probably did have sexual contact with his daughter. Because the daughter was uncooperative, denied any intercourse and appeared afraid of her father, however, the investigation was discontinued and no charges laid.

6. Admissions

a. Extent of Admissions

The single most significant factor in the success of Police investigations is whether or not the accused makes a statement to the Police. It appears that a denial with no corroboration is sufficient to have the case abandoned. An admission, on the other hand, is the major basis on which charges are laid.

Police are divided as to the extent to which admissions occur. Some suggest that admissions are obtained frequently. Others indicate that, particularly in intra-familial situations, the more common pattern is an initial denial with an admission obtained only in the context of plea discussions after charges have been laid. Our survey of 1979 occurrences indicates the following incidence of admissions obtained on arrest according to offence:

	Total	Admission On Arrest	Denial On Arrest	No Record	% Of Admissions
Incest	12	3	3	6	25.0%
S.I. Under 14	17	10	2	5	58.8%
S.I. 14-16	10	4	3	3	40.0%
Attempt Rape	7	3	1	3	42.8%
Rape	27	7	3	17	25.9%
I.A.F.	80	22	20	38	27.5%
Total	153	49	32	72	32.0%

The high percentage of cases where the Police records do not indicate whether or not an initial admission was secured, limits the value of these statistics. It appears, for example, that charges were laid in 69 or 45% of the occurrences.[8] When charges were pursued, 52.3% of the accused eventually did plead guilty.[9]

It should be noted, however, that in the San Jose, California program, 75% of the accused confess in the first interview and an additional 15% shortly thereafter. These confessions are obtained for a variety of reasons. The reputation of the program for fair treatment of the offender encourages co-operation. The Parents United organization and pressure from the mother are additional factors. The fact that the Police no longer go out and arrest the accused, but instead suggest to his wife that he call for an appointment with the Police, adds to the climate of encouragement and support.

b. Inducements to Admissions

A major concern of all Police Officers interviewed was the necessity of obtaining a voluntary admission, not obtained "by fear of prejudice or hope of advantage exercised or held out by a person in authority".[10] Similarly, Police Officers have no right to advise an accused as to how he ought to plead or what the circumstances might be.[11] Should an admission be given in such circumstances, it could later be ruled inadmissible in Court.

The possibility of using self-help groups at the early stages of the investigation was cause for concern in this regard. Would a Police referral to a Parents United Group, for example, be regarded as an inducement which could invalidate a subsequent admission? If the self-help group holds out to the accused the possibility of favour by making an admission, could a subsequent statement be ruled inadmissible? In the San Jose, California experience, this has not been a problem. Again, any pressure on the accused comes from the mother or the self-help group. The Police generally tape-record the child's statement and play it to the mother to secure her support. It is the mother and the self-help group who explain to the accused the advantages of co-operation. As yet, there has been no legal challenge to this procedure.

In Canadian law, it is unlikely that the mother or a self-help group would be considered "a person in authority". Such a person has been defined as "anyone whom the prisoner might reasonably suppose to be capable of influencing the course of the prosecution".[12] A prison chaplain and an independent doctor called by the

Police have been held not to be persons in authority. A magistrate, Police Constable, prosecutor, a prosecutor's wife, and a jail guard, have been so found. It is important to note, however, that an inducement held out by someone not in authority in the presence of someone in authority may render a subsequent confession inadmissible.[13]

7. Medical Evidence

An immediate medical examination of the victim is a routine part of the investigation only in rape cases. Our survey of 1979 occurrences shows the extent to which medical evidence is sought:

	Total Occurrences	Medical Indicated In Report	Percentage
Incest	12	5	33.3%
S.I. Under 14	17	6	35.2%
S.I. 14-16	10	4	40.0%
Attempt Rape	7	2	42.8%
Rape	27	24	85.1%
I.A.F.	80	16	17.5%
Total	153	57	37.2%

Whether or not a medical examination is undertaken in cases other than rape depends on the circumstances of the individual case, the nature of the assault and the wishes of the child and/or her parents. When medical examinations did occur, 54.3% were performed at the Hospital for Sick Children, 8.7% at Scarborough Centenary and a similar percentage at North York General. In 10.5% of the cases, the parent took the child to the family doctor. The Police generally prefer to have the examination done where the medical staff are familiar with sexual assault procedures and are willing to attend Court. A local hospital more conveniently located for both the Police and the victim may be rejected because it does not meet these criteria.

The Police reports are sketchy as to the evidence provided by the medical examinations. Of the 57 cases where medicals were performed, the reports indicate the following results:

	Cases	
Pregnancy or V.D. shown	4	7.0%
Sexual intercourse established	12	21.0%
Physical injuries	11	19.2%
Inconclusive	10	17.5%
Samples taken (forensic results unknown)	16	28.0%
No indication on record	10	17.5%
Total	63	110.2%

8. Forensic Evidence

Police and Crowns both complain about delays in securing forensic reports. The Centre for Forensic Sciences do not commence their analysis of rape samples until a not guilty plea has been entered and a date set for trial. A delay of six months or more awaiting the results of forensic examinations is not uncommon. This has serious implications on how quickly a case can be brought to trial.

IV. The Decision to Charge

The decision to lay charges or not is the responsibility of the Police. At present, the Investigating Officers exercise their own discretion in this matter, generally without consultation with either the Crown Attorney or the C.A.S. On occasion, where evidentiary problems exist, they may refer the case to the senior official of the Division's Investigation Unit and/or to a Crown Attorney.

Where charges are laid, this will be recorded on the occurrence report. Where charges are not laid, the reasons why the Investigating Officer decided not to pursue the matter must be noted on the report. If the occurrence is cleared as "unfounded", or the suspect is cautioned, this also appears on the record.

1. Overview

Our survey of 153 occurrences of reported sexual offences against children in 1979 indicates the percentage of cases in which charges were laid. The multiple charges laid in some cases are not shown in the table.

	Total Cases in Sample	Total Cases Where Charges Laid	Total Cases Where Charges Not Laid
Incest	12	4 (33.3%)	8 (66.6%)
S.I. Under 14	17	13 (76.4%)	4 (23.5%)
S.I. 14-16	10	4 (40.0%)	6 (60.0%)
Attempt Rape	7	3 (42.8%)	4 (57.1%)
Rape	27	12 (44.4%)	15 (55.5%)
I.A.F.	80	33 (41.2%)	47 (58.7%)
Total	153	69 (45.0%)	84 (54.9%)

An average charge-laying rate of 45% is higher than the rate at which charges for sexual offences generally are laid across Ontario. The Canadian Centre of Justice Statistics (Statistics Canada) does not specifically identify offences against children.[14] Its data for all sexual offences in Ontario during 1980 indicates:

	Reported Occurrences	Unfounded Reports	Offences Cleared By Charge	% Of Actual Occurrences Cleared By Charge
Total sexual offences	5,162	731	1,769	39.9%
Rape	828	338	250	45.0%
Indecent Assault Female	2,911	265	932	35.2%

This percentage is calculated on the basis of what are defined as "actual incidents", excluding those determined by investigation to be "unfounded". Research indicates, however, that many incidents the Police clear as "unfounded" may actually have occurred but, for one reason or another, are not pursued.[15] A more useful calculation from our perspective would be the rate of charges laid as a percentage of occurrences reported. On this basis, the Ontario data would be:

	Percentage of Reported Occurrences Cleared By Charge
Total sexual offences	34.2%
Rape	30.1%
Indecent Assault Female	32.0%

The Metropolitan Toronto rate of laying charges in cases of sexual offences against children, while higher than the Provincial average for all sexual offences, should nevertheless be compared with the rates of laying charges in other jurisdictions. In the 1960's, the arrest rate in the Boroughs of Brooklyn and the Bronx in New York City was 69.2%. [16] In San Jose, California, at present, 95% of their over 600 intra-familial referrals are charged and referred to the sexual abuse program. [17]

It is of interest to note the extent to which charges are laid, broken down by the relationship of the assailant to the victim. The Police occurrence reports in this regard are somewhat sketchy, however, and relationships must sometimes be inferred from the facts of the case. Our best "guess-estimate" from the sample of 153 occurrences in 1979 is as follows:

	Family/ Caretaker	Friend/ Acquaintance	Stranger
Incest			
Charges laid	4	0	0
Charges not laid	7	1	0
	11	1	0
S.I. Under 14			
Charges laid	1	12	0
Charges not laid	2	1	1
	3	13	1
S.I. 14-16			
Charges laid	1	2	1
Charges not laid	1	5	0
	2	7	1
Attempt Rape			
Charges laid	0	0	3
Charges not laid	0	1	3
	0	1	6
Rape			
Charges laid	2	6	4
Charges not laid	0	5	10
	2	11	14
I.A.F.			
Charges laid	9	11	13
Charges not laid	8	21	18
	17	32	31
Total	35	65	53
Total charges laid	17	31	21

Expressed as a percentage, the relationships of assailant to victim in our sample were as follows:

Family and caretakers	22.8%
Friends and acquaintances	42.4%
Strangers	34.6%
Total known to victim	65.2%

In terms of charges laid, 48.5% of the complaints against family and caretakers resulted in charges laid, 47.6% of the complaints against friends and acquaintances, and 39.6% against strangers. The lower percentage of charges against strangers likely reflects the cases where the assailant was unknown and not apprehended. Otherwise, the data reveals a relatively even-handed approach as between family/caretakers and friends/acquaintances.

2. Factors Considered in Not Laying Charges

An important objective of our study has been to identify why the Policy do not lay charges in the majority of reported cases. The factors noted by Investigating Officers in the 1979 occurrence reports provide some useful data.

a. Incest

An analysis of the twelve reported occurrences of incest in 1979 is a good introduction to the prevailing approach. Of the twelve occurrences, three were judged to be "unfounded", and in four other cases there was "insufficient evidence to substantiate the charges". Factors noted by the Police include:

- a denial by the accused (three cases)
- the credibility of the victim (i.e. parents report that she is "a problem" and sexually active with her boyfriend); and
- lack of physical or medical evidence (two cases).

The key factor, however, in not pursuing the investigation, appears to be the attitude of the family and/or the complainant. This factor was mentioned in six, or 50% of the reported incidents. This may take the form of a denial by the complainant, hostility by the mother, or a desire not to proceed expressed by the complainant, her parent, or the C.A.S. In only one case was there an explicit notation on the report that the Society expressed a desire to avoid the trauma of the proceeding. In all other cases, the motivations of the child and/or her family were not recorded.

b. Sexual Intercourse with Female Under 14 Years

The highest percentage of charges were laid with respect to sexual intercourse with a female under the age of 14 years (76% of the reported occurrences). This is a clearly-defined offence, not restricted by relationships or avoided by consent on the part of the child. A child under 14 years of age cannot give a legal consent to sexual intercourse.

Again, however, the attitude of the mother was key to why charges were not laid. In one case, the mother and victim did not wish to complain and became involved only as a consequence of a report from the C.A.S. In another, the mother consulted with the leaders of her church and indicated that "in an effort to keep the family together" no action should be taken against the stepfather. The father who continued to deny his involvement was cautioned by the Police and the investigation was discontinued.

Notwithstanding the absolute liability nature of the offence, the Police also exercised their discretion to mediate what they considered to be the harshness of the law. Where the victim was a "mature thirteen year old" involved with her sixteen year old boyfriend, the Officers marked the occurrence "cleared through investigation" with the notation that "it was not the intention of the law to prohibit this type of occurrence". Changes to the Criminal Code under Bill C-127 will codify this type of practice, providing a defence to a charge of sexual assault (although not to the carnal knowledge under 14 charge) where the accused is no more than three years older than the complainant. 18

c. Sexual Intercourse with Female 14-16 Years

The low rate of complaints and of prosecutions for this offence (40%) reflects the fact that a conviction cannot be secured if the complainant is not "of chaste character", or if "the evidence does not show that the accused is more to blame" than the complainant. 19 Where the girl has had previous sexual relations with the accused, is "in love with" the accused, or there is the possibility that the accused will raise the consensual defence, charges are not laid. In one case, the fact that the complainant was taking birth control was interpreted to "remove any question that the offender was more to blame". In another, the unstable mental condition of the complainant due to family problems was a factor.

In two of the six cases where charges were not laid, a complete denial by the accused appears to be the principal reason for no further action. In one case, a 14 year old victim and two C.A.S. workers alleged sexual intercourse with her step-father on at least ten occasions, each time with the mother present. When the step-father and the mother denied any knowledge of the allegations, the incident was cleared with the note "NO FURTHER INVESTIGATION REQUIRED!! CLEAR!" (The child was apprehended by the C.A.S.).

d. Attempt Rape and Rape

Of 27 reported incidents of rape, charges were not laid in 15 cases (55.5% of the total). Nine complaints were judged "unfounded". Public mischief charges against the complainant were laid in four cases. Again, the factors considered in deciding not to charge were primarily the reaction of the complainant or her family, the credibility of the complainant (discrepancies in her story, drug or alcohol use, sexually active), and the lack of medical or forensic corroboration.

In once case of attempt rape by a family friend, the Police had an admission from the accused and wanted to prosecute. The family was adamant, however, that they did not want to proceed ("talking to the family about the prosecution gets them upset") and ultimately the suspect was only cautioned. The family, of ethnic origin (Indian) had been reluctant to report the incident because of the detriment to the girl's Hindu marriage prospect and the shame on the family. The report had been made only out of a desire to end harassing phone calls from the accused.

e. Indecent Assault Female

In 15 of the 80 complaints (18.7%) the assailant was unknown and not apprehended. Lack of corroboration, insufficient evidence, the credibility of the victim, and the desire of the child or her family not to proceed again were the key factors in not pursuing other complaints.

These cases illustrate other factors which the Police consider in deciding to lay any charge for a sexual offence against children.

- The competency of the child to testify is a key issue. In many situations, the Officers may know that the offence occurred, but assume that the child witness could never be sworn. Where unsworn evidence is given, corroboration is necessary. If no obvious corroboration exists, the case will not be pursued. If the child is young, a "slow learner", inarticulate, or emotionally disturbed, the Police generally lack the expertise and the confidence to find more subtle types of corroboration or to prepare the child for trial.

- The credibility of the victim is questioned if the child has "emotional problems" or is undergoing psychiatric treatment. Apart from the truth of the original complaint, the Police are concerned that the victim will not make a "good witness" in Court.

- The Police generally do not prosecute cases arising in the context of a domestic separation or divorce. They appear skeptical of the motivations prompting the complaint, and are reluctant to be drawn into a legal dispute on behalf of one party or the other.

- If the accused acknowledges that he has a problem and confirms that he is engaged in treatment, charges may not be laid. Similarly, if the Police are "satisfied that the accused will conform to C.A.S. requirements", there may be no criminal charges. If the treatment or counselling later breaks down, however, the Police are generally unaware of that fact and do not then lay the charges.

3. Summary

Our survey results clearly indicate that, in Metropolitan Toronto, charges against alleged sexual abusers are laid substantially less frequently than in jurisdictions where specialized sexual abuse programs exist. At present, the wishes of the victim and the family not to proceed are a significant deterrent to further action. Perceived problems with corroboration and prevailing myths as to the credibility of the complainant also detract from laying more charges. If a pro-prosecution policy is to be pursued, the Police will need specialized training, and the victim and her family will need immediate assistance to resolve the ambivalence they may presently feel in these situations.

V. Child Abuse as a Provincial Offence

S.47(2) of The Child Welfare Act specifies that "no person having the care, custody, control or charge of a child shall...inflict abuse upon the child or permit the child to suffer abuse". The penalty for such offence is a fine of $2,000.00 or imprisonment for a term of no more than two years, or both.[20] It should be noted that the prohibition applies to the abuser and also to the passive onlooker who "permits the child to suffer abuse".

An accused charged under this section would be prosecuted under The Provincial Offences Act.[21] To our knowledge, however, there has been only one prosecution under S.47 of The Child Welfare Act. The C.A.S. generally does not want to prosecute on the grounds that to do so would undermine its protection and rehabilitation mandate. The Police have laid charges under the abandonment, curfew, and the interference with wards provisions of The Child Welfare Act, but never S.47. The one case that did occur resulted from plea discussions between a defence counsel and a part-time Crown Attorney.

The Legal Advisory Committee, a sub-committee of lawyers meeting under the auspices of the Special Committee, has recommended that greater use be made of this provision. Charges could be laid under both The Criminal Code and under S.47 of The Child Welfare Act. In certain circumstances, the criminal charges could be withdrawn and Court proceedings confined to the Provincial offence.

The Provincial offence route could be used, for example, for first offences, for cases where the complainant does not want criminal charges, or where the offender is genuinely contrite and actively engaged in a treatment program. Penalties provided include fines, the possibility that payment of the fine could be suspended pending successful completion of specified conditions (this would require a legislative amendment to The Child Welfare Act), imprisonment, a 30-day delay in commencing incarceration, an order for costs, and probation with a variety of conditions.

Defence counsel who are preoccupied with conditions in Federal penitentaries for sex offenders, indicate greater willingness to encourage guilty pleas (and even to prosecute these types of offences) if they were processed as Provincial offences. Family lawyers see this route as a type of diversion program, combining mediation, conciliation and treatment with the legal leverage of a fine, jail sentence and probation order. If Provincial offence proceedings could be completed more expeditiously, with less trauma for the victim and her family, and with more immediate access to treatment than is possible in the Criminal Courts, this route may be worth considering. These issues remain to be explored.

From a philosophical perspective, however, Provincial offences are primarily "quasi-criminal", of a "minor regulatory nature". [22] The objective of The Provincial Offences Act, is to encourage a different approach by which "offenders ought not to be treated like criminals, whether inadvertently or by association". [23] To proceed under S.47 of The Child Welfare Act would be to decriminalize sexual abuse and to free abusers from the stigma of a criminal conviction. If "true crimes prescribe activities which are or are deemed to be dangerous, harmful or bad", [24] it is appropriate that sexual abusers be subjected to the full force of the criminal law. Certainly, where the thrust is towards greater prosecution of sexual abusers, to proceed as a Provincial offence would provide a contrary message.

If our perspective is the welfare of the victim, however, it is imperative that we fully examine all the implications of the S.47 of The Child Welfare Act option (including time frames to completion and the possibility of beefing-up prosecution personnel). Ultimately, we may decide that S.47 of The Child Welfare Act provides an opportunity for flexibility in individual cases which otherwise may be foreclosed.

VI. Relations with the C.A.S.

As was discussed previously, [25] the Police generally do not consult with the C.A.S. before they decide to charge. On occasion, however, when the Society is already involved with the child and the family, they may decline to lay charges in deference to a Society recommendation. The problems of joint investigations and mutual sharing of information have been discussed elsewhere.[26]

A further problem is the general tendency not to refer cases involving extra-familial assailants to the C.A.S. The Police reports are vague and inconsistent as to the extent referrals actually occur. Where referrals were noted in our sample, they arose almost exclusively in cases of intra-familial assault. The failure to refer all cases to the C.A.S. may expose the victim to continuing risk from an inattentive parent, and may leave other children vulnerable to potential abuse. The practice warrants serious reconsideration.

VII. Arrest and Release of the Accused

1. Conditions of Bail

On arrest, the accused may be released from custody immediately.[27] The Police Officer or Officer in charge can impose conditions on this release, but such conditions are unenforceable and they seldom do so. The more common practice (in 50%-75% of our sample) is to detain the accused in custody for a "show cause" or "bail hearing" before a Justice of the Peace or a Provincial Court judge.[28] This must be held within twenty-four hours, or as soon as possible thereafter. The advantage of such a hearing is that the accused will be released on specific conditions imposed by the judge. Typically, the arresting Officers suggest a wide range of conditions, a form of "over-kill", knowing that many will not actually be incorporated into the bail order.

At a bail hearing, the onus is on the Crown to show that the accused should be detained for the protection of the public or to ensure his subsequent appearance in Court. Where there is a previous criminal record, any outstanding charges, or some indication of mental instability, the accused may be detained in custody pending trial. In most cases, however, the accused will be released on his own recognizance, sometimes with a security bond ("surety") to be posted. Where the Crown shows cause that conditions of release are required, conditions normally are attached.

There are a variety of conditions which may be included in an order for interim release.[29] Those most common are:

- no contact with the complainant directly or indirectly;
- no contact with anyone under 14 years unless accompanied by an adult;

- no contact with wife;
- no attendance at premises of the complainant except with the permission of and in the presence of wife;
- report to the bail project or the Police once a week;
- adhere to a curfew;
- abstain from drinking; or
- seek treatment.

2. Enforcing the Bail Order

There are, however, several problems with the interim release process:

- There is no authority for a condition compelling treatment, notwithstanding that such an order is occasionally made.

- An assessment of the accused (done at Metfors) is possible at this stage only with the consent of the accused. Some Police Officers request that the accused be detained to get an assessment. Often, however, Crowns do not have enough information as to the psychiatric history of the accused. Defence counsel seldom consent to an assessment unless their client is likely to be detained otherwise.

- Breach of the conditions is generally monitored by the complainant and her mother. If the father seeks to make contact, they must inform the Police who may then re-arrest the accused. Where the mother is divided in her loyalties, the breach of condition may go unreported.

- More commonly, the complainant or her mother asks that the no-contact condition be waived or deleted. Having initiated a treatment program, for example, defence counsel may argue that the no-contact provision impedes family therapy. If the Crown does not agree to a change in the bail order, an application to the Court is made. Where a no-contact order is deleted or waived and the father returns home, what protections exist for the victim?

- A bail review can occur at any stage of the proceeding. If the accused interferes with the victim before or during the preliminary hearing, the Crown could then apply to have the interim release order cancelled and the accused detained. If the bail order has previously been waived to allow contact with the victim, however, this remedy is difficult to enforce.

VIII. The Court System

1. Decentralized Structure

All sexual assault cases are initiated in the Provincial Courts Criminal Division. These are decentralized in Metropolitan Toronto at the following locations:

Old City Hall, 60 Queen Street West, Toronto;
College Park, 444 Yonge Street, Toronto;
1000 Finch Avenue West, Downsview;
80 The East Mall, Etobicoke; and
1911 Eglinton Avenue East, Scarborough.

Cases arising within the catchment area of the five Provincial Courts are initially channelled to that Court for processing.

2. Choice of Court

If detained in custody, the accused will make one or several appearances in Court on a "show cause" or bail hearing until the detention issue is determined. Further Court appearances will be necessary to set a date for trial. On the date fixed to proceed, the victim and all other witnesses will normally be subpoenaed to attend at Court.

The accused, however, has an election as to how he will treat this day in Court. If the judge is considered appropriate and the Crown co-operative, the accused may enter a plea before the Provincial Court judge. If he pleads guilty, agreed upon facts may be read into the record and sentencing will occur immediately. If he pleads not guilty, a trial before the Provincial Court judge will take place. If he elects to be tried before a judge and jury, or a single judge, in County Court, the proceeding will go ahead before the Provincial Court judge as a preliminary hearing. With the consent of the Crown, the accused may waive the evidence at the preliminary hearing and the matter would be referred directly to the County Court for trial.

These procedural choices have advantages for both the accused and the Crown. They are generally not understood, however, by the victim and the witnesses who are psychologically geared up for one proceeding and find that another actually occurs. Typically, the victim is subpoenaed as a witness and she attends at Court only to find that the matter has been put over for another date.

Most sexual abuse cases are dealt with entirely at the Provincial Court level before a Provincially-appointed judge and in the less formal setting of the local Courthouse. Of 52 cases in our dope sheet survey of charges laid in 1979, the accused proceeded in Provincial Court in 32 or 61.5% of the cases. In seventeen cases (32.6%), the accused elected to proceed to County Court at 361 University Avenue. In three cases, the accused skipped bail and a bench warrant was issued.

Serious charges such as rape, attempt rape and incest, usually combined with a charge of indecent assault female, will generally prompt an accused to proceed to the higher Court. From the perspective of the accused, trial at County Court offers the advantages of delay, more time to make submissions, the opportunity for a jury trial, and a perception that County Court judges are less severe. It is striking, however, the extent to which even serious charges such as the sexual intercourse charges, do proceed at Provincial Court. Indecent assault charges, unless joined with a more serious offence, almost always remain at the Provincial Court level.

3. Length of Time

If the accused proceeds at the Provincial Court level, the case can be dealt with relatively expeditiously. In most Courts, there is an effort to implement a 90-day rule, so that cases are completed, or the preliminary is heard, within 90 days of the first Court appearance. Our 1979 dope sheet survey indicated that the 32 sexual abuse cases proceeding at Provincial Court were handled in the following time frames, from date of arrest to final disposition:

	Cases	Percentage
30-60 days	4	12.5%
61-90 days	10	31.2%
91-120 days	7	21.8%
121-150 days	3	9.3%
151-180 days	4	12.5%
181-210 days	2	6.2%
210 + days	2	6.2%
	32	

If the case proceeds to County Court, however, there could be a delay of one to two years before the case will finally be resolved. In our 1979 dope sheet survey, there were fifteen cases that went beyond the preliminary to County Court. The time frames for the resolution of these cases from arrest to final disposition were:

	Cases	Percentage
3-6 months	3	20.0%
7-9 months	2	13.3%
10-12 months	6	40.0%
13-15 months	1	6.6%
16-18 months	3	20.0%
	15	

A three-month campaign to clear the backlog of criminal cases in County Court is now underway. As more cases than previously are now coming to the Court, however, it is unclear whether delays can be reduced in the future.

If the case proceeds to County Court, there are numerous scheduling conflicts which make even an agreed-upon hearing date problematic. There are only ten judges at the County Court, sitting in seven Criminal Courts and two Civil Courts simultaneously and presently handling approximately 3,000 cases a year. Depending on the availability of judges and the progress of the docket, a case may proceed on the scheduled date or not. If no judge is available, or there is insufficient time remaining in the day to present a proper case, the Crown and defence counsel may agree to adjourn the matter for another time (three or four months hence).

The strain on witnesses, especially the victim, and on the family, is apparent. Psychologically prepared to go ahead on a particular day, and waiting around the Court House to proceed, they are most let down when the decision is finally made to adjourn. By this stage, the accused also wants to get the issue resolved. The practical problem, however, is that there is no space or time at County Court to complete the cases.

4. Organization of the Courts

Provincial Criminal Courts are not at present structured to provide support or reassurance to the child victim. Provincial Court-houses have no facilities for witnesses. The child is forced to confront her assailant (father or otherwise) in the public halls. Alternatively, she may wait in the Crown's office, requiring secretaries of the Crown to act as babysitters.

Scheduling is another problem. The child comes to Court at 9:30 a.m. or 10:00 a.m. geared to go ahead immediately. If the Court docket is lengthy, she may be kept waiting for hours before her case will proceed. The delay increases her anxiety, adds to her disenchantment with the legal process, and may reduce the impact of her testimony. To avoid this problem, one Crown tries to channel these cases to Assignment Court where they will be the only case on the docket. Alternatively, sexual offences can be scheduled in the afternoon at a specific hour.

Several Crowns expressed the desire for a special Court to hear these types of cases. At present, these cases are generally heard in an open Courtroom. Crowns find it hard to ask for a closed Court, although they do so on occasion. Even when the Court is cleared, however, there are still at least eight people present (the judge, Court clerk, reporter, security officer, the Police Officer, the accused, his counsel and usually the mother of the victim).

At present, it is unlikely that one special Court could be designated to handle these cases exclusively. The decentralized nature of the Provincial Court system is one problem. Another is the number of cases to be processed. Until sexual assaults are prosecuted at the same rate as driving offences, it may be difficult to justify the allocation of resources. An additional deterrent is the practice by defence counsel of "judge shopping". The defence bar takes very seriously its right to select, to the extent possible, a judge who will be most sympathetic to the client's case.

This does not mean, however, that sexual assault cases could not be accorded a priority and perhaps be scheduled for specific Courts if necessary as the exclusive case on the docket. This would require discussions with the Deputy Crown Attorney and the senior judge at each Provincial Court.

IX. The Crown Attorney

1. Assignment

There are approximately seventy full-time Assistant Crown Attorneys in Metropolitan Toronto, and several hundred lawyers who act as Crowns on a part-time basis. The Crowns are decentralized, working under a Deputy Crown Attorney at each of the Provincial Courts and at the County Court at 361 University Avenue. Crowns are assigned to their cases by the Deputy Crown Attorney at random and at various stages in the process. Some are allocated before or immediately after the bail hearing. Others are assigned much later, possibly on the day before the preliminary hearing. This depends on the caseload and the practice of individual Deputy Crown Attorneys.

There are no Crowns formally designated as specialists in sexual assault cases. Several Crowns scattered throughout the system, however, have handled more cases than most and have established expertise in the successful prosecution of these types of offences. Sometimes, local Police Officers prefer that female Crowns take these types of cases and seek them out for consultation in advance of assignment. Informed of the case already, that particular Crown may then proceed with the case.

Three years ago, several Crown Attorneys were designated as a special rape team. The team broke down, however, for a variety of reasons. Among them was the fact that inadequate numbers were assigned to the team to develop and maintain the necessary staffing flexibility. Scheduling conflicts, vacation time, and large caseloads inevitably forced the work to be assumed by others than the specialists. The only specialized unit presently functioning within the Crown's office is the fraud squad housed at the University Avenue Court House.

There has been a policy in recent years that the Crown initially assigned a sexual assault case is to stay with that case throughout the process, through the preliminary hearing to trial and disposition. The advantages of such a "vertical prosecution" policy include continuity, consistency, minimized preparation time, and greater convenience for the victim.

The policy, however, is subject to staffing limitations and appears to be only partially implemented. Defence counsel and Police report that in individual cases, they have dealt with many Crowns. The extensive use of part-time Crowns is one problem. The need for Assistant Crown Attorneys to be in County or Supreme Court is another. The practice of assigning different Crowns to run all cases in set date and remand Courts necessarily imposes discontinuity in individual cases. There appears also to be a practice that when a plea of guilty is anticipated, the "continuity of Crown" rule does not apply. Unfortunately, it may take many months or a year for the expected plea to be entered, and the benefits of the vertical prosecution policy are lost.

2. Preparing the Complainant for Court

The Crown generally contacts the Police Officer to work together in preparing the case. Some Crowns specifically direct the Police to advise the complainant of the Crown's name and number and invite them to call the Crown if they so desire. Most rely on the Police to arrange the interview between the Crown and the complainant.

Crowns vary dramatically in how they prepare the victim for the preliminary hearing. One normally sees the complainant twice: once to establish an initial rapport, and a second time a week before the hearing for a more intensive interview. Other Crowns interview the child only once, a few days or a week in advance of the preliminary. This advance preparation enables the Crown to see the child in a quiet setting, with no interruptions and with undivided attention.

A disturbing number of Crowns, however, see the complainant for the first time in the hour before Court. Sometimes this requires the Crown to ask for a short recess so that he can "isolate the issues and prepare the witness". Crowns who customarily interview the victim on Court day argue that heavy caseloads and "the reluctance of the victim to come to Court anyway" justify the practice.

Some Police report that, in their experience, heavy workloads make it rare for the Crown Attorney to conduct any effective preparation of the victim for Court. It is left to the Police Officer, for example, to prepare the child for the questions that the judge would ask to determine her capacity to be sworn. Where the Officer neglected this preparation, even a child raised in a convent was unable to respond appropriately to the judge's questions. Thereafter, this same Officer adopted the practice of referring his child witnesses to the Salvation Army Courtworker to have her explain the significance of the oath.

Those Crowns who do take the time to prepare their child witnesses vary also in how they conduct their interview of the victim. Some Crowns interview the child alone, others want a Police Officer present. The Police Officer is generally very familiar with the child's formal statement and can help correct any inconsistencies which may arise. One Crown always has the Officer present as a potential witness to verify that the child was not pressured by the Crown in what she says. Another wants the Police Officer or the C.A.S. worker, primarily because they have a more established rapport with the child. On rare occasions, counsel for the child is present at the interview for the same reason. Whether or not the mother is present generally depends on the wishes of the child. Where the mother is a complaint witness, she will be excluded. If the child is agreeable, many Crowns prefer the mother not to be present on the expectation that children are more candid in private.

The purpose of the interview is to clarify the history, go over the evidence, review the statements and prepare the complainant for cross-examination. Often the child asumes that because the Crown knows the facts, she does not need to tell the story again. The Crown explains the Court process and the role of the participants. Some physically take the child to the Courtroom and describe who sits where and what each one does. The Crown is also concerned to ascertain the capacity of the child to testify. He or she explains the oath and the questions asked by the judge. Above all, the Crowns seek to instill confidence in the complainant that the Crown is "on her side" and will handle any problems that arise.

One exceptional Crown also uses the interview to organize who will come to Court as a support for the child (including a referral to the Rape Crisis Centre Trial Support Program if appropriate). This is particularly important once the child is on the stand for cross-examination. Should she break down and a recess be called, the Crown and other witnesses (e.g. the Police Officer, her mother) are not permitted to speak with her. If there is no other support for the child, Courtroom staff may be thrust into this role. At the County Court, for example, women are always assigned as jury matrons in sexual assault cases. If no one else is present, these women take the child out and calm them down during the recess.

3. Working with the Parent

The need for Crowns to work with the mother of the complainant is a very time-consuming and frustrating process at present. Some mothers are unreasonable and vindictive beyond any concern for the needs of the child. Others are more concerned about saving the relationship with their husband or common-law partner than protecting the child. It is not unusual for the wife to put pressure on the child to recant and on the Crown to withdraw the charges and stop the proceedings. On occasion, the mother will inform the Police or the Crown that she and the child will not come to Court again. Technically, the Crown could issue a warrant compelling the child to attend as a witness. [30] In practical terms, however, the Crown has no choice but to withdraw the charges.

X. Support for the Child

1. Police Support

At present, the prime support for the child throughout the process comes from the Police Officers with whom she has established a rapport initially. It is the responsibility of the Police Officer to have the witnesses available for Court. To ensure that contact is not lost with the victim, it is essential that the child, as the key Crown witness, be kept as happy as possible. This involves the Police in a variety of activities including: keeping the child informed of Court proceedings, liaison with the Crown, preparing the child for Court, providing transportation to Court, babysitting, calming the child while waiting to proceed and during recesses, and resolving any problems which may arise within the family (e.g. conflicting views between parents, pressure by the mother on the child to recant). Depending on the personal proclivities of individual Officers, this involvement with the child can be extensive and time-consuming. In some cases, the Officer becomes a "substitute male figure" whom the victims telephone often for reassurance.

This support function falls on the Police by default, for lack of anyone else better trained or better placed to assume the role. Some Officers accept the interaction, others find it a burden which they resent. The quality of support which the child enjoys depends on the personalities of each Officer. There is a consensus, however, that the role is essential, but that it should be performed by someone other than the Police.

2. The Crown

The role of the Crown as prosecutor of the case imposes limitations on the extent to which the Crown can provide support for the child. It is the duty of all Crowns to ensure that their prime witness is properly prepared for Court. The extent of this preparation, however, is at present problematic.[31] Once testimony has begun, the Crown is not permitted to act as a coach or confidante to the child. Before and after the Court proceeding, the Crown has neither the time nor the resources to provide the ongoing support which the child requires.

Crown Attorneys' offices in Canada have traditionally been less activist than is characteristic of District Attorneys in the United States. Unlike their American counterparts, the Crown is not involved in the decision to charge. They do not monitor all complaints. Their full-time staff is small and inter-disciplinary programs within the Crown's office are non-existent.

3. The Children's Aid Society

Where the child is involved with the Society, it is customary for her worker to accompany her to Court. Often, however, the worker will be subpoenaed as a witness to testify as to the condition of the child or the progress of the family. Where the worker is also a witness, she may be excluded from the Courtroom while the child and other witnesses give their evidence. If not a witness, the worker can stay in the Courtroom to provide support for the child during her testimony.

Some C.A.S. workers feel very uncomfortable with their role. Often they are not informed as to progress of the criminal proceedings. They do not understand how the system functions, and they feel ill at ease conversing with Court officials.

4. Independent Counsel for the Child

To reduce the trauma of the Court process, use is now beginning to be made of the victim/witness advocate.

This has developed in an ad hoc fashion, involving lawyers who act as independent counsel for the child.

These lawyers are retained from three sources. If the child has already secured a lawyer under S.20 of The Child Welfare Act, that same lawyer may be authorized by the Official Guardian's Office to assist the child in Criminal Court. Special Legal Aid certificates have also been provided to secure the services of a private lawyer for the child. One particularly experienced lawyer has handled four cases in this manner. The socio-legal team at the Canadian Foundation of Children and the Law (Justice for Children) has provided assistance in several recent cases. They work with children who have not been subject to child welfare proceedings, and also those sixteen and seventeen years of age who are beyond the jurisdiction of child welfare agencies.

The policy of the Official Guardian's Office is to provide a range of retainers. The most common is authorization for the lawyer to attend the Criminal Court hearing on a watching brief to help prepare for subsequent Family Court proceedings. All occasions when this has been requested have been approved to date. On a few occasions, the lawyer has been authorized to talk with the Crown and to exchange information. In three or four cases, counsel for the child has been authorized to take a place at the counsel table. This has occurred only where the Crown has made the invitation, where the child has an excellent rapport with her lawyer, and where the lawyer could better elicit answers from the child. Active participation at trial by counsel for the child has not been approved where the Crown was not agreeable and where there was no specific reason to believe that the child could not participate at trial without the presence of her own lawyer.

The lawyer who has acted on Legal Aid certificates has a well-developed analysis of her role as victim/witness advocate. In her view, the bulk of her work is outside the Courtroom. She "creates a space" around the child vis-à-vis her family and the system. She acts as a liaison with the Police, the Crown and the over-bearing parent; explains the process to the child; and the child to the system. She acts as a "supplement" to the Crown, sits in on the preparatory interviews, interprets the child's language, suggests additional witnesses, assists with the investigation, and acts as a sounding-board for plea bargaining. On the day of trial, she provides the continuity and "insulating" function that the victim/witness requires. To date, this lawyer has found that Crowns are happy to work with her and that the victim/witnesses who are properly prepared and provided with continuing emotional support at trial generally can take care of themselves during cross-examination.

Other counsel take a more traditional view of their role. According to this theory, the role of counsel for the witness is to ensure that his client is fairly dealt with in Court. This means that the child is properly prepared for her testimony and that she avoids incriminating statements. The role of child's counsel is not to act as a support for the Crown, nor as a supplementary investigator.

If lawyers for children disagree as to their function in criminal proceedings, other participants in the process are equally confused. Some judges have questioned the status of counsel for the child, but no judge has yet refused counsel standing where it has been requested. Some Crowns and Police Officers have encouraged participation by independent counsel for the child, and indeed, have made the referral for representation. Others feel that if the Crown is performing properly, counsel for the child is redundant. Some C.A.S. social workers applaud the ability of a lawyer to make the system more responsive to the child's needs. Others insist that the child has "sufficient support from the C.A.S. and the Youth Bureau and doesn't need the assistance of a lawyer".

Clearly, utilizing lawyers as victim/witness advocates in the criminal process is a new development which has yet to be regularized in any consistent fashion. Since most victims of sexual abuse are not at present brought before Family Court in child welfare proceedings, most do not have access to counsel through the Official Guardian's Office.[32] Whether they are referred to other sources of assistance depends on individual Police Officers, Crowns, social workers and parents.

Whether lawyers are best suited to act as victim/witness advocates is another issue. It could be argued, for example, that much of what counsel for the child does could better be performed by well-trained social workers or volunteers. Because lawyers are assuming the role de facto is not sufficient justification for the practice to continue. On the other hand, lawyers are best equipped to deal with the criminal justice system and the various participants in the process. To the extent that more sexual abuse cases are brought before Family Court, more children will already have access to counsel in those proceedings. Counsel for the child could act as an effective bridge between the two systems, working to reduce delays wherever possible. The child who has already established a rapport with counsel in Family Court will appreciate the assistance of "her own lawyer" in the criminal context. That funding mechanisms already exist to pay for lawyers, and not for other professionals or even volunteers, is a significant factor in terms of immediate implementation.

If lawyers are to perform this function, however, their role must "come out of the closet", be officially recognized and the expectations of the position clarified. This will require training sessions for lawyers on the Official Guardian's panel and any others who expect to act in this capacity.

XI. The Child as Witness

1. Preliminary Hearings

Our 1979 dope sheet survey did not indicate to what extent victims were actually required to testify in Court. It is not clear from the dope sheets, for example, whether a witness subpoenaed to Court took the stand, whether evidence was waived, or whether a guilty plea was entered without any viva voce evidence being heard. In 13 of the 52 cases in our sample (25%), there is specific reference to the preliminary hearing on the dope sheet. (In two cases, the evidence at the preliminary hearing was waived). Normally, the victim would be the only Crown witness at the preliminary hearing. In 27 of the 52 cases (51.9%), the accused ultimately entered a guilty plea. Whether or not the child had already been required to testify is not clear from the records.

Full trials in incest cases are sufficiently rare as to be very noteworthy when they occur. The most common pattern is to conduct the preliminary hearing and then obtain a guilty plea later. From the perspective of the Crown, however, it is crucial for the child to go through the preliminary hearing. The experience of giving testimony in Court makes the child into a prepared witness. The transcript of her testimony at the preliminary hearing will normally be used to refresh her memory prior to trial.

2. Court Orders to Protect the Child

In intra-familial sexual offences defence counsel often apply for an order prohibiting publication of the evidence until the accused is discharged or the trial is ended.[33] Such an order protects the accused, the victim and the family from the glare of unwelcomed publicity. It is customary for witnesses to be excluded from the Courtrooms until called for their testimony. The Crown may also request that the public be excluded from the Courtroom.[34]

The judge determines who stays and who leaves. If the mother is to be a witness, for example, she can be called to give her evidence first and then remain for the testimony of the child. A Children's Aid Society social worker, school psychologist or counsel for the child may also be permitted to stay as a support for the child.

3. Determining the Capacity of the Child to Testify

American District Attorneys spend considerable time in Court establishing that the child can give sworn evidence or is otherwise competent to testify. Because of the questions they ask and their manner of asking, younger children (five years and above) are increasingly able to give sworn evidence.[35]

Here, by contrast, determining the capacity of the child is seen as the responsibility of the judge and the Crown usually takes a passive role in Court. If the Crown (or the Police) have not prepared the child, or the judge is unskilled with communicating with children, qualification of the witness becomes a major obstacle. It is rare, for example, for children as young as those in the United States to be put on the stand and to be found capable of giving sworn evidence. Establishing the competency of mentally retarded children also present real problems for the Court. Even when the victims are teenagers over 14 years of age, defence counsel may argue that mentally retarded children of this age are incompetent to testify.

4. Direct Examination

a. The American Experience

To help the child tell her story at Court, increasing use is now made in American Courts of a variety of visual aids. Anatomically-correct dolls are used to prepare the child for Court and to illustrate his story in testimony. 36 In Baltimore, Courtroom size pictures designed by a medical illustrator are used to help the witness "unlock details of her story". 37

In Minneapolis, videotapes of the child's initial statement are being used for a variety of purposes: to reduce the number of interviews of the victim, to put pressure on defence counsel and his/her client to enter a quilty plea and to assist social services personnel in planning for the child. The videotapes are also introduced in Court, not as a substitute for the child, but to assist the judge in making a determination of credibility. 38 In two American jurisdictions, pre-trial testimony of the witness can be videotaped and subsequently shown to the judge at trial. 39 This procedure, however, is not generally accepted. 40

Increasing attention is also being directed in the United States to expert witnesses as a supplement to the testimony of the child in Court. 41

In Seattle, Washington, and Montgomery County, Maryland, social workers with extensive clinical experience in sexual abuse programs have been accepted as expert witnesses in criminal proceedings. They give evidence concerning child development and support the credibility of the child. They also testify as to the characteristics of intra-family child sexual abuse cases, or what is now called the "sexually abused child syndrome". 42 (See Appendix I).

b. Practice in Metropolitan Toronto

There has been little use of such techniques as yet in Metropolitan Toronto. Anatomically-correct dolls are used by the Hospital for Sick Children Sexual Abuse Team and, in at least one case, have proven effective in securing information not otherwise volunteered. They have not as yet been used in Court.

Whether these techniques would be admissible in Court is not yet clear. Legal research is required to determine whether new approaches to handling sexual abuse cases are acceptable under Canadian law and, if not, what arguments could be advanced to secure their acceptability.

5. Cross Examination

a. Alternative Models:

There have been other suggestions as to how the trauma of testimony in Court could be avoided. The Israeli practice of a youth interrogator to question the child and present her evidence in Court is one model.[43] David Libai's "Child Courtroom" with a one-way mirror enabling the child to testify outside the immediate presence of the accused is another.[44]

American Courts have held, however, that a defendant in criminal proceedings has a constitutional right to be present at his trial and to confront and cross-examine witnesses in person.[45]

The Ontario Attorney General has also expressed his "strong reservations" about the application of the Israeli system to Canadian criminal proceedings.[46] The fundamental rights of an accused to confront and examine his accuser, and in some cases to a trial by jury, have been codified by the new Charter of Rights and Freedoms. In Canada, as in the United States, the constitution may preclude radical charges on behalf of the child.

b. Present Practice

For lack of an alternative, the child must now submit to cross-examination by defence counsel on behalf of the accused. This may take several hours, or several days. Defence counsel will focus on the credibility of the witness and any discrepancies in her story.

> The best counsel do not attack the witness. They learn everything they can about the witness in advance, use expert advice if necessary, and then ask their questions in a soft, friendly and direct manner.
>
> Some judges indicate that defence counsel tend to "tread softly" when the victim is a child. Sometimes it is apparent that the client has instructed his counsel not to cross-examine the child. When defence counsel fail to pose essential questions, however, the judge may feel the need to cross-examine the witness, a role he or she is loathe to assume.
>
> On some occasions, defence counsel rehash all the details of the occurence so that the "stark horror" of the situation is exposed. Agonizing over the details is an excruciating experience for the child. Skilled defence counsel find this approach counter-productive to their client's interest and avoid it. Others by their ardour convict their own clients, and re-assault the child in the process.
>
> As we have discussed previously, a child who is well-prepared for Court can withstand any cross-examination.[47] For preparation in advance of Court and as a support in the Courtroom during testimony, victim/witness advocates have already proven very useful.

XII. Defence Counsel Perspective on the Process

Defence counsel are adamant that the criminal justice system is an adversarial process, and that their mandate is to win an acquittal, or at least the "best possible deal" for their clients. To that end, they are concerned that:

- the accused not talk to authorities without the benefit of counsel;
- that inducements not be held out to secure an involuntary admission;
- that the accused enjoy all the protections now guaranteed by the Charter of Rights;

- that delay be used so long as it is advantageous to the accused;
- that problems in the Crown's evidence be exposed; and
- that the credibility of the Crown's witnesses be challenged.

Defence counsel are also of the view that the criminal justice system should not be used for social service objectives and that a pro-prosecution policy premised on a desire for treatment is unrealistic. So long as an accused is faced with the possibility of long-term confinement in a federal penitentiary, neither the accused nor his counsel can afford to be cooperative. They argue furthermore that effective treatment programs in Federal and Provincial facilities are non-existent.

In cases that were prosecuted as a Provincial offence under The Child Welfare Act, defence counsel would take a different position. The remedial perspective of the Family Court and its focus on the well-being of the victim are seen as positive factors favouring more successful rehabilitation. As the potential maximum sentence would be only two years less a day in a Provincial facility, the risk to their client would be considerably decreased.

XIII. Plea Discussions

When a plea will be entered is a decision for the accused and his counsel, depending on several factors including the identity of the judge and Crown Attorney in Court on the particular day. If the judge is perceived as lenient and the Crown as co-operative, the accused may decide to enter a plea and proceed immediately, thereby ensuring that the presiding judge is seized with his case for the purpose of sentencing.

In serious sexual assault cases, it is rare for the accused to enter a plea prior to the date set for the preliminary hearing. Normally, the preliminary proceeds and a plea is entered after the accused has been committed for trial. Alternatively, the evidence at the preliminary is waived and the accused enters a plea at the date set for trial in County Court. Where the accused proceeds in Provincial Court alone, the plea is usually entered on the date set for trial.

In return for a guilty plea, the Crown may be prepared to withdraw some of several multiple charges, proceed only on a lesser offence, or ask for a non-custodial or reduced sentence. How they proceed depends on the strength of the individual case and what the accused can offer in exchange.

Plea discussions between the Crown and defence counsel goes on continuously, from the earliest stages of the process until the trial itself in underway. If the case proceeds to County Court, a pre-trial will be held about two weeks prior to the Court date, at which time an attempt will be made to narrow the issues and reach a settlement. Until recently,[48] judges on occasion participated in the plea discussion process, suggesting possible resolutions during recess at trial.

Some Crowns make it a practice to sit down with defence counsel and the Police to discuss a plea before the child has been geared-up to testify in Court. Calling the client as a witness is used as leverage by both sides to get a plea. If the Crown's case is strong, he or she will argue that forcing the child to appear as a witness will be used as an aggravating factor in sentencing showing the accused's lack of remorse. If the accused pleads guilty, thereby avoiding the need for the child to testify, the Crown will be more lenient. Some Crowns take the position that if they can get a guilty plea on any substantial sexual offence, they will take it and not put the child through the experience. If the Crown's case is problematic, defence counsel capitalize on the Crown's reluctance to use the child in Court as a means of improving their client's position. The threat of trauma to the child at this stage of the proceeding is seen as an advantageous negotiating strategy for both sides.

Crowns differ, however, as to the "bottom line" in plea discussions with respect to sexual offences. If it is a serious offence, involving permanent psychological or physical injury, any possibility of a repeat, or an offender from outside the family, Crowns will pursue it, assuming that they have the evidence to prove the case. If there are any evidentiary problems, Crowns will consider a plea to a lesser offence. Some Crowns make it a policy never to take a common assault plea in lieu of a sexual assault charge. Others do not adhere to this position.

In discussing possible pleas, Crowns find certain procedures should be followed. All possibilities should be discussed with the Police before a decision is made. This does not always occur at present. Some Crowns also discuss the position with the parent of the victim. This precludes the possibility of later complaints. At Court, the Crown will normally put on the record the reasons for the lesser plea, a statement of all the Crown's evidence, and an indication that the plea has been discussed with the mother of the victim.

XIV Disposition

Our survey of 1979 occurence reports indicated that charges were laid in 69 cases or 45% of the sample. Those cases involved 80 defendants. Our 1979 dope sheet survey, supplemented by reference to the Criminal Identification Bureau, Police Records Department, indicates the disposition of those defendants.

1. Conviction Rates

Our sample indicates that convictions on one charge or another were obtained against 76.1% of the traceable adult defendants. Thirty-three defendants, 52.3% of the sample, entered a guilty plea. Twenty of those defendants (60.6%) entered a guilty plea in exchange for the Crown withdrawing other charges. Our global data, without taking account of multiple charges, is as follows:

	Defendants	
Guilty Plea	33	52.3%
Charges Withdrawn:		
- In exchange for plea	(20)	31.7%
- Absolute withdrawal	3	4.7%
Discharged or Acquitted	6	9.5%
Not Guilty by Reason of Insanity	2	3.1%
Bench Warrant	4	6.3%
Found Guilty	10	15.8%
Found Guilty of Lesser Offence	5	7.9%
Total Defendants:	63	
Total Convictions:	48	76.1%
Total Not Convicted:	15	23.8%
Juvenile Defendants (Results Unknown)	12	
Defendants Missing From Sample	5	

2. Sentencing Patterns

This conviction rate, stated boldly, does not indicate the complex pattern of plea discussions, withdrawals, convictions and sentences which exist where multiple charges are laid. The sixty-three adult defendants in our sample were actually charged with 104 sexual offences. The general trends, divided according to charge, were as follows:

a. Incest

- acquittal in one case, but probation of three months and three years on two counts of indecent assault female.
- convictions in three cases, with jail terms of two months with the temporary absence program, nine months, and two and one half years plus probation.

b. Sexual Intercourse Under 14 Years

- charges withdrawn in seven cases. In one case, the accused was given a suspended sentence and two years probation for indecent assault female.
- acquittal in three cases.

- convictions in three cases, with jail terms of one day, seven days and twenty-two months plus two-three years probation.

c. **Sexual Intercourse 14 - 16 Years**

- charges withdrawn in three cases.
- convictions in two cases. One received a suspended sentence plus three years probation, the other two years probation.

d. **Rape**

- charges withdrawn in one case, but one year jail term for indecent assault female.
- discharge or acquittal in two cases
- acquittal of rape in two cases, but jail terms of three months and four months plus probation for indecent assault female.
- conviction by guilty plea in one case with a jail term of two years less a day.
- not guilty by reason of insanity in two cases.

e. **Attempt Rape**

- withdrawn in one case.
- conviction with a jail term of eighteen months in one case.
- guilty pleas to indecent assault female in two cases. The offender received a conditional discharge and a suspended sentence plus probation.

f. **Indecent Assault Female**

- charges withdrawn in six cases.
- acquittal in eight charges, but guilty of common assault. The sentences included an absolute discharge, a

conditional discharge, suspended sentence, and, in two cases, fines of $500.00 or 30 - 50 days in jail. Probation orders of one to three years were included.

- Convictions in twenty cases. Sentences ranged from conditional discharge plus probation (4 cases) and a suspended sentence plus probation (8 cases), a fine of $150.00 or fifteen days, to jail terms of fifteen days, thirty days (3 cases), three months, six months and one year plus probation. In two cases, the temporary absence program was used.

These cases clearly illustrate the tendency to take a plea or secure a conviction on a lesser charge than that originally laid. Thus, rape or attempt rape is reduced to indecent assault; indecent assault becomes common assault. The extent to which charges of sexual intercourse under fourteen years are withdrawn, however, is noteworthy and warrants further investigation.

Our sample also illustrates that jail terms are infrequent. They are indicated in only eighteen (37.5%) of successful prosecutions. The length of incarceration imposed is also relatively short:

1 - 30 days: 6 cases
2 - 9 months: 6 cases
1 year - 2½ years: 6 cases

3. Sentences for Incest Across Canada

The jail terms for the incest convictions in our sample appear lenient by comparison to the incest cases reported from across Canada. Increasingly, inadequate sentences imposed at trial are being appealed by the Crown, and Courts of Appeal are responding accordingly.

The trend across the country is to prison terms of three to five years. In two recent cases, an initial suspended sentence plus probation was raised to five years.[49] In another, 90 days was increased to two years[50] and 18 months to three years.[51] Sentences of eight years and ten years have been imposed in exceptional circumstances.[52]

The Ontario Court of Appeal shares the increasingly strong stand taken by the Appeal Courts on incest. In a recent case, Mr. Justice Cory (with the support of Mr. Justice Jessup) gave an eloquent rationale on why these cases are to be taken more seriously.

> "Civilized society has long viewed this crime with abhorrence. Parliament has confirmed that it is indeed a serious crime. It could be said that as a result of the increasing frequency of the crime which usually does not involve violence that the Court should take an enlightened and lenient view upon sentencing for incest. After all it could be argued that it is no more than manifestation of the current liberated sexual morals. If the victim is not too adversely affected by the crime, why should the Courts take a serious view of a private act committed without violence.
>
> I cannot accept such a position. Incest between a father and a thirteen year old daughter cannot be thought of as comparable to an act performed by consenting adults. A child of that age cannot possibly be in a position to give her informed consent to the act. Indeed, sexual intercourse between strangers where the girl is under fourteen years of age constitutes a crime in itself. The crime is surely more serious when committed by a father. How can a daughter really resist a dominant figure who is a provider, teacher and guide; a figure who is the prime source of benefits and punishments. The relationship between a father and daughter creates such subtle and well-nigh irresistible pressures as to make the idea of real consent farcical. One can readily understand how the victim may appear to be a willing participant in the act. It is not difficult to understand the sense of guilt that the victim must experience when she understands the full import of what has occurred. It is quite natural that she should feel, in part, responsible for her father's disgrace and for any punishment he may suffer.
>
> Incest is a serious crime. Although performed without violence, it may well

> leave lasting scars. The crime is one which often has terrible consequences for the victim. It consitutes a breach of the greatest trust that can be bestowed on a man, the trust of his children. It constitutes a tearing of the foundation fabric of society, for it can change the family from a unit generating support and love to a unit fostering mistrust and loathing. It is appropriate that in most cases of incest involving young children that a term of imprisonment should be imposed. There are decisions of this Court which confirm that position." [53]

Judicial recognition of the impact of incest is to be applauded. The imposition of long-term prison sentences in federal penitentiaries, however, may be dysfunctional. Where a family unit exists to be salvaged, an alternative approach may be preferable. This involves sentences in Provincial institutions, utilizing the Temporary Absence Program, combined with a mandatory treatment provision in long-term probation.

4. Suspended Sentences

Unlike the practice in some American jurisdictions, a suspended sentence in Canada means suspension *of the passing of any sentence*, and not suspension of the sentence itself. A judge has no authority under *The Criminal Code* to impose a jail term and then suspend its operation. Nor is it appropriate to postpone sentencing for a lengthy period simply to determine whether the accused will behave himself. [54]

The Ontario *Provincial Offences Act*, however, has adopted a new perspective. To permit an offender to arrange his affairs, a Court can order that custody commence not more than thirty days after the day of sentencing. [55] When specifically authorized by statute, the Court can also suspend the payment of fines subject to the performance of specified conditions. [56]

5. Assessments and Pre-Sentence Reports

On occasion, a case will be adjourned after conviction in order to obtain an assessment or a pre-sentence report on the accused. The Court has the power to order an assessment, without the offender's consent, only after a finding of guilty. Essential psychiatric information about the nature of the offender is learned only at this stage, many months or even a year after the charges are laid.

Pre-sentence reports are social histories of the offenders prepared by Probation Officers, on the request of the Court. Pre-sentence reports are not requested in the majority of cases.

XV. Probation

1. Incidence of Probation Orders

A probation order is a customary part of most dispositions. In our sample, all the defendants found guilty, with a few exceptions, were given a term of probation from one to three years. The exceptions were those given an absolute discharge, those imprisoned for over two years, and those insane committed to the care of the Lieutenant Governor.

Normally, conditions of various kinds are attached to probation orders. These may include, for example, the requirement to report to the Probation Officer, support spouse and dependants, maintain employment, abstain from drinking, attend for assessment on treatment, or to "refrain from living in a home where a female of minor age is a member".[57] The materials at our disposal, unfortunately, do not indicate the specific conditions attached to the probation orders in our sample.

2. Organization of Probation Services

Probation services are provided by the Provincial Ministry of Correctional Services. Eleven Area Managers supervise twelve Probation Offices decentralized across the city. An offender must report to the office in the area where he lives.

Cases are generally assigned to Probation Officers at random. There is a trend within local offices, however, towards designating particular Officers as specialists for particular types of offenders. These include drugs, alcohol, psychiatric, Native Canadians and the young unemployed.

As yet, there is no specialized program for sexual offenders. To our knowledge, there is only one Probation Officer in one local office who is a specialist in sexual offenders. His average monthly active caseload of 120 cases, however, includes only twelve actually found guilty of sexual offences. An undetermined number of others were convicted of other offences with "sexual overtones". More extensive programs for sexual offenders have not yet been identified as a need within the system.[58]

There is some interest, however, in developing a program for female probationers who have themselves been victims of sexual abuse. One officer reported that a "sizeable minority" of her soliciting and prostitution cases, for example, indicated a history of incest, the effects of which had not yet been resolved.

3. Enforcement of Probation Orders

a. Supervision

Normally, the Probation Officer has no contact with the Police, the Crown, the judge or the jail. Unless a pre-sentence report is prepared, the only information the officer has is a copy of the probation order and what the offender chooses to tell him. Details about the nature of the offence or the social history of the offender are often unknown.

This lack of information, combined with the heavy caseloads of the average Officer, make minimal supervision inevitable. The Officer can only have brief meetings with the client, refer him to an appropriate program and monitor his participation. Where a judge maintains a supervisory role over the offender himself, the offender or his Probation Officer will report to the Court at periodic intervals.

b. Treatment Orders

The enforcement of treatment orders is at present problematic. Judges, unaware of specific treatment programs, often order the offenders to attend for assessment or treatment "as determined by the Probation Officers". The breadth of these orders puts a heavy burden on the Officers, and makes enforcement very difficult. Where the judge names a specific facility or program, there is a better chance of compliance.

> The enforcement of treatment orders naming specific programs (usually the Clarke Institute) is difficult in itself. A client who refuses to attend for treatment violates his probation order and can be brought back before the Court on a charge of failure to comply.[59] To establish that the breach of condition is willful, however, witnesses from the treatment facility must attend at Court. When they are reluctant to do so, the charge is usually dropped.
>
> Where the client continues to attend for treatment, but is unmotivated or becomes resistant, the treatment program often terminates their involvement with him. In these circumstances there is no willful failure to comply and hence no breach of probation that can be brought back to Court. In effect, the treatment condition of probation lapses.
>
> It would be useful to know how many treatment orders at present are ultimately complied with and are effective. To our knowledge, this information is not readily available.[60]

XVI. Compensation for Victims

Victims of crimes of violence may apply to the Provincial Injuries Compensation Board for compensation.[61] Payment may be made for expenses resulting from the injury, pecuniary loss affecting capacity to work, pain and suffering, the maintenance of a child conceived as a result of rape, and for "moderate legal fees" incurred in making an application to the Board.

Applications must be made within one year after the date of injury. In the case of children, so long as they are under eighteen years, this limitation period will usually be waived. Although hearings are public, applications from victims of sexual offences are normally heard in camera. It is customary, furthermore, for the Board to prohibit the publication of evidence related to sexual offences.

All claims for compensation are listed in the Annual Report of the Board. In 1980-1981,[62] there were twelve applications as a result of rape, and another twelve resulting from indecent assault. Five of those applications were on behalf of children under sixteen years, including one by the Official Guardian for an infant assaulted by his parents, and another for a two and a half year old who saw her mother assaulted. The awards for rape ranged from $2,000.00 to $9,935.00; for indecent assault from $264.00 to $3,675.00. There were no awards reported for incest.

Clearly, most victims of sexual abuse do not apply to the Board for compensation. The Official Guardian's office will pursue applications on behalf of abused children. To date, however, they have received relatively few referrals, many of them from protection Societies outside the city. There is some concern that Children's Aid Society workers in Metropolitan Toronto do not know about the remedy and are not referring to the Official Guardian children who would be eligible for assistance.

Notwithstanding the existence of information brochures, public knowledge about the remedy appears to be minimal. Perhaps Police Officers should make it a policy to inform all complainants of the existence of the Board and their right to make an application.[63]

FOOTNOTES

1. Lorenne Clark and Debra Lewis, Rape: The Price of Coercive Sexuality, The Women's Press, Toronto, 1977.

2. Robert L. Geiser, Hidden Victims: The Sexual Abuse of Children, Beacon Press, Boston, 1979, pp. 8-10.

3. Edward D. Hegney, "The Need to Improve Methods of Investigating Complaints of Rape", Mimeo Paper, 1974, p. 6.

4. Mary Kay Barbieri, "The Prosecution of Child Sexual Abuse Cases", Mimeo, p. 2.

5. Mary Ellen Abrecht, Panelist on "Prosecuting the Adult Offender in Cases of Sexual Abuse of Children", at Second National Conference on Sexual Victimization of Children, Washington, D.C., May 7, 1982.

6. See pp. 22-23.

7. Jean Goodwin, Doris Sahd, Richard Rada, "Incest Hoax: False Accusations, False Denials" in Wayne M. Holder ed. Sexual Abuse of Children: Implications for Treatment, American Humane Association, Englewood, 1980, pp.37-45.

8. See p.56.

9. See p.83.

10. Ibrahim v. R. (1914) A.C. 599 at 609.

11. Clayton C. Ruby, Sentencing, 2nd Ed., Toronto, Butterworths, 1980, pp. 183-184. R. V. Butler (1973), 11 C.C.C. (2d.) 381 (Ont. C.A.).

12. Cross on Evidence, 5th Ed., Butterworths 1979, p. 541.

13. Ibid, p. 542.

14. Statistics Canada, Crime and Traffic Enforcement Statistics 1980, Catalogue 85-205, Table 2, pp. 25-26.

15. Clark and Lewis, Footnote No. 1, pp. 35-38; Thomas McCahill, Linda Meyer, Arthur Fischman, The Aftermath of Rape, Lexington, Toronto, 1979, pp.103-122.

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19. *Criminal Code*, S. 146(2)(3).

20. *Child Welfare Act*, R.S.O. 1980, c. 66, S. 94(2).

21. R.S.O. 1980, c. 400.

22. W. Douglas Drinkwater and J. Douglas Ewart, *Ontario Provincial Offences Procedure*, Carswell, Toronto, 1980, p.iv.

23. *Ibid*.

24. *Ibid*, pp. 22-23.

25. See p.55, compare p.2.

26. See pp.25-27.

27. *Criminal Code*, S. 452, S. 453.

28. *Criminal Code*, S. 454, S. 457.

29. *Criminal Code*, S. 457(4).

30. *Criminal Code*, S.472, S. 633.

31. See pp.71-73.

32. See pp.30-34.

33. *Criminal Code*, S. 467(1).

34. *Re. R. v. Grant* (1973) 13 C.C.C. (2d.) 495 (Ont. H.Ct.).

35. See Footnote Nos. 4 and 5; also Edwin Wenck, Assistant State Attorney, Baltimore, Maryland, panelist on "Innovations in Legal Intervention", at Second National Conference in Sexual Victimization of Children, Washington, D.C., May 8, 1982. See also American Bar Association, National Legal Resource Centre for Child Advocacy and Protection. *Child Sexual Abuse and the Law*, 2nd Ed., February 1982, pp. 125-139.

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37. Wenck, Footnote No. 35.

38. Deborah Anderson, Director of Sexual Assault Services, Hennepin County, Attorney's Office, Minneapolis Minnesota, on panel, Footnote No. 35.

39. Va. Code, S. 18.2-67 (Repl. Vol. 1975); S. C. Code Ann., S. 16-3-660, 16-3-370 (Cum. Supp. 1980).

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41. Lucy Berliner et. al, "Expert Testimony on the Dynamics of Intra-Family Child Sexual Abuse and Principles of Child Development" in A.B.A. Ibid, pp. 166-183.

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47. See p.76.

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50. R. v. Moulton, (1979) 3 W.C.B. 192 (B.C.C.A.).

51. R. v. Savage, (1979) 2 Man. R. (2d) 292; 22 Crim L.Q. 295 (Man. C.A.).

52. R. v. Leclerc, unreported June 7, 1976, No. 10-000103075 (Que. C.A.).

53. R. v. Clayton, unreported June 3, 1982 (Ont. C.A.). quoted by Cartwright C.C.J. in R. v. A.B., unreported, June 18, 1982, pp. 39-40. See also R. v. Beaudin, unreported, March 30, 1981, (Ont. C.A.); R. v. Curry, unreported, June 25, 1978 (Ont. C.A.); R. v. Demers, 63 C.C.C. (2d.) 351 (Que. C.A.).

54. R. v. Brookes (1970) 4 C.C.C. (2d.) 377 (Ont. C.A.); R. v. Nunner (1976) 30 C.C.C. (2d.) 199 (Ont. C.A.).

55. Provincial Offences Act, R.S.O. 1980, c. 400, S.64(2).

56. Ibid, S. 71.

57. R. v. Comtois, 62 C.C.C. (2d.) 567 (Que. C.A.)

58. Rita Carroll, "Service Delivery Needs for Toronto and East York", Fall 1981.

59. Criminal Code, S. 666.

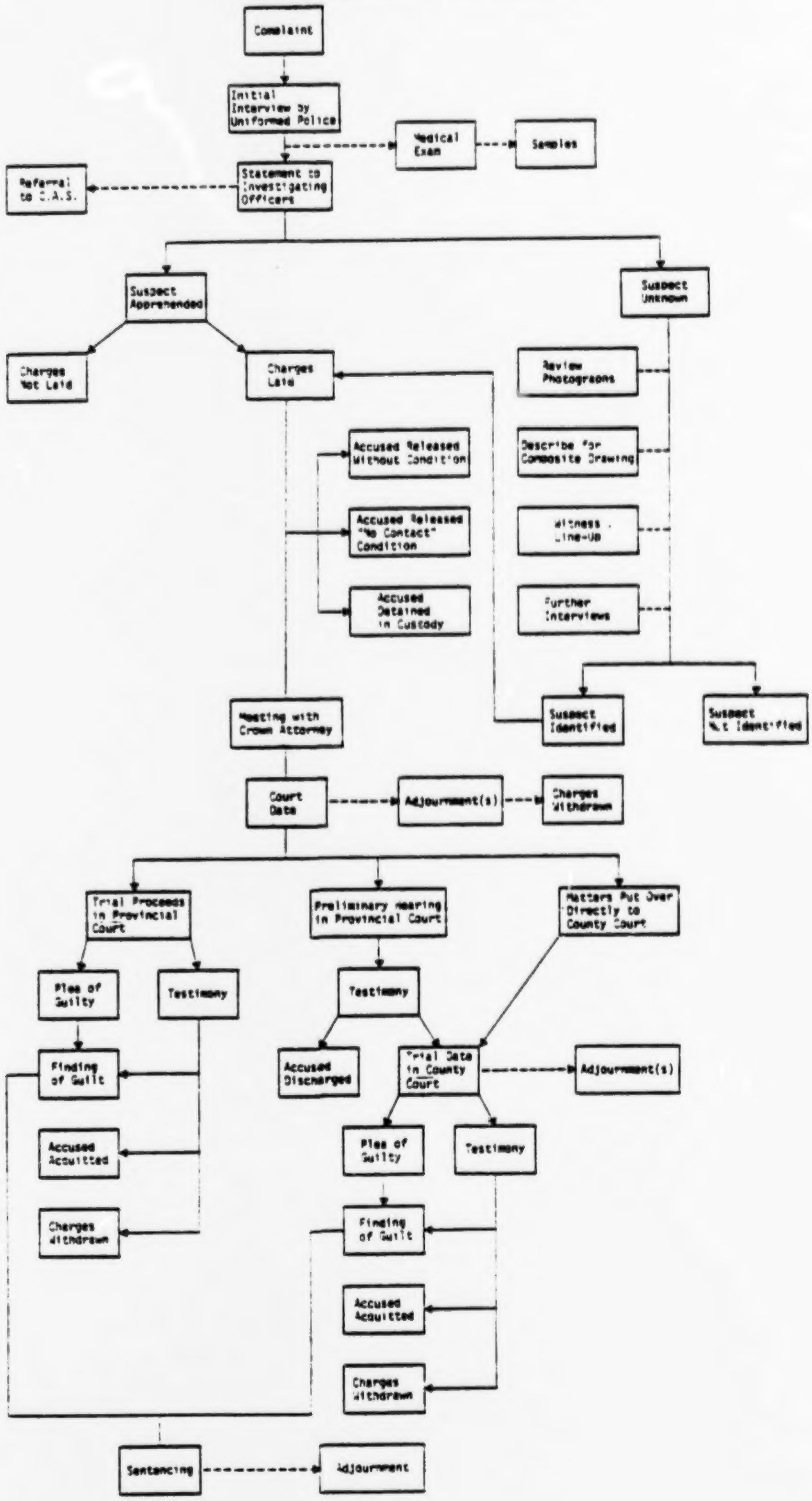
60. Crime Code Tables maintained by the Ministy of Correctional Services track clients within the system, recidivism rates and subsequent convictions. They do not trace conditions of probation.

61. Compensation for Victims of Crime Act, R.S.O. 1980, c. 82.

62. Criminal Injuries Compensation Board, Twelfth Annual Report, 1980-81.

63. "Police to Aid Crime Victims", Toronto Star, September 10, 1982.

FLOW CHART: CRIMINAL JUSTICE SYSTEM
FROM THE PERSPECTIVE OF THE CHILD


Complaint
Initial Interview by Uniformed Police
Medical Exam
Samples
Statement to Investigating Officers
Referral to C.A.S.
Suspect Apprehended
Suspect Unknown
Charges Not Laid
Charges Laid
Review Photographs
Describe for Composite Drawing
Witness Line-Up
Further Interviews
Accused Released Without Condition
Accused Released "No Contact" Condition
Accused Detained in Custody
Suspect Identified
Suspect Not Identified
Meeting with Crown Attorney
Court Date
Adjournment(s)
Charges Withdrawn
Trial Proceeds in Provincial Court
Preliminary Hearing in Provincial Court
Matters Put Over Directly to County Court
Plea of Guilty
Testimony
Testimony
Finding of Guilt
Accused Acquitted
Charges Withdrawn
Accused Discharged
Trial Date in County Court
Adjournment(s)
Plea of Guilty
Testimony
Finding of Guilt
Accused Acquitted
Charges Withdrawn
Sentencing
Adjournment

CONCLUSION: A MARRIAGE OF NECESSITY

This review of the legal response to child sexual abuse in Metropolitan Toronto clearly reveals the "two solitudes" which presently exist.

Although required to respond simultaneously to the same occurrence in a single family, the divergent perspectives of the child welfare and the criminal justice systems continually reinforce their tendency to work in isolation. As a result, the child victim of sexual abuse too often suffers further and unnecessary trauma.

It is the mandate of the child welfare system to provide protection to children who are victims of sexual abuse. The "filtering process" which exists, however, undermines the protection which is available. Most reports of offences against children, for example, are not defined as sexual abuse by the Police and hence are not transmitted to the Children's Aid Societies. Other occurrences are experienced by victims who, because of age, are "ineligible" for protective services. Where complaints are investigated and validated by a C.A.S., the most common response is "voluntary supervision", which has been found to be largely ineffective. Recourse to the Family Court on behalf of sexually abused children occurs infrequently. When it does, there is seldom any explicit recognition that the problem exists. The Provincial Child Abuse Register, established to track abusers, screens out almost as many cases as it records.

The criminal justice system has a duty to mobilize the force of law against offenders, for deterrence and for the protection of society. The focus of this system is not on the well-being of the victim, but on proving the existence of an offence and the guilt (or innocence) of the accused. The initial investigation may be long, tedious and highly intrusive for the victim. Equally disturbing, it may be concluded summarily, depending on a denial by the accused or the failure of the Police to interview an identified suspect. Charges are laid in 45% of all sexual offences against children, but only in 33.3% of incest cases. The wishes of the family not to proceed, problems with corroboration, and concerns about the credibility of the victim are the principal reasons given by the Police for their decision not to lay charges.

The laying of charges alone does not vindicate the victim. The victim will still be required to testify in Court, as the key crown witness in the case. She may or may not be adequately prepared by the Crown. She may or may not actually testify on the day she is scheduled to appear. It may be months, or even years, before the case is finally concluded. When it is, the charges may be withdrawn or the accused convicted on a lesser offence. His sentence may be insignificant; or a treatment order imposed as a condition of probation may be largely unenforceable.

Clearly, neither system, in isolation, is adequately fulfilling its function. What contact that does exist between the systems, moreover, is dysfunctional. Police and social workers still have not devised a mutually-satisfactory procedure for conducting joint investigations. Neither generally consults the other as to how they will handle the case. Neither keeps the other informed as to how the case is progressing. Although it may be in the best interests of the child to maintain her in her home, the failure to secure or enforce "no contact" provisions in the bail order of the accused may render such a plan impossible. Parallel proceedings commenced in Family and Criminal Court heighten the adversarial nature of the child welfare matter and increase the possibility of delay in the ultimate resolution of the protection issue.

Without question, the present responses to child sexual abuse in Metropolitan Toronto are not working - for the victim, for her family, or for the community interests which both systems are mandated to serve. Since neither system alone is able to deal effectively or humanely with the problem, a new approach is necessary. Perhaps it is time to bring the systems together, and to propose a marriage between the best parts of both: a marriage not of convenience but of absolute necessity.

Experience elsewhere indicates that the interests of both systems and, most importantly, the child victim, can best be served by an integrated therapeutic and criminal justice response. The best available evidence, for example, indicates that Court-ordered treatment provides the greatest leverage for rehabilitation. Conversely, criminal dispositions which do not incorporate an adequate treatment component appear to increase the likelihood of recidivism. Finally, prosecution of the offender can be therapeutic for the child victim who, with proper support, realizes that she is not to blame for either the abuse or its consequences.

The acceptance of a common philosophy, the development of detailed joint protocols, the designation and training of specialized personnel and the development of appropriate support services are prerequisites for a successful integrated response. Whether the systems in Metropolitan Toronto have the will to make the marriage work is now the critical challenge before them.

SUMMARY OF FINDINGS

THE CHILD PROTECTION SYSTEM

1. The lack of statutory definition for "sexual molestation" means that different definitions are applied among and within the mandated systems and the community in general. Most incidents of sexual abuse are now reported initially to the Police, not the Children's Aid Societies. Since the Police define child abuse as limited to abuse within the family, incidents involving friends, acquaintances and strangers are generally not reported to the C.A.S. (p.21)

2. Adolescents 16 and 17 years of age who have not previously been involved with a Society do not qualify for protective services under The Child Welfare Act.[25] This "legal limbo" effectively deprives many sexually abused adolescents of access to appropriate services. (p.25)

3. Joint investigations by the Police and the C.A.S. produce many problems from the perspective of both agencies. C.A.S. workers are concerned, for example, that the Police in some circumstances appear reluctant to initiate or continue an investigation. They are also uncertain as to their role once the Police are involved. The Police, on the other hand, are anxious that the C.A.S. not interfere with the offender and that they maintain their distance during the Police investigation. The Police also feel that C.A.S. workers have unrealistic expectations as to their capacity to predict the result of criminal proceedings. In their view, joint consultation is only useful if it occurs immediately after the offence is reported and investigated. (p.26)

4. After the initial investigation, there is frequently a failure of communications between the Police and the C.A.S. about the progress of the case. (p.28)

5. Parallel proceedings in Family Court and Criminal Court often cause the child to "sit in limbo" pending the resolution of the criminal charges. This occurs because juggling between the two Courts has tactical advantages for all parties (except the child), and because some Family Court judges refuse to make a disposition order until the criminal matter is resolved. The laying of criminal charges also accentuates the adversarial nature of Family Court proceedings. (p.29)

6. In 73.9% of sexual abuse cases handled by the M.C.A.S. in 1980-1981, there was no Family Court intervention. The normal response was to provide services to the girl and her family on a voluntary basis either directly or by referral to another agency. The principal factors considered in the decision not to initiate protection proceedings was that the abuser was out of the home, or that the abuser was not a member of the family. (p.31)

7. "Continuing supervision" by the protection Societies on a voluntary basis may be illusory. Previous studies indicate a serious absence of appropriate sexual assault management programs, a lack of family therapy and of follow-up. In 22 of 66 cases in our M.C.A.S. sample (33%), the sexual abuse occurred in families already reported to the M.C.A.S. and subject to agency evaluation and/or supervision. (p.33)

8. When protection proceedings for sexual abuse cases are commenced in Family Court, few actually proceed to trial. Often, a Supervision Order or Society Wardship will be obtained on consent. Another approach is to obtain a finding on the basis of "other concerns" besides sexual abuse. (p.35)

9. In Metropolitan Toronto, 56.2% of sexual abuse cases referred to the Family Court by the M.C.A.S. resulted in initial Supervision Orders. Other statistics indicate that in child abuse cases generally, 32.1% of cases resulted in Society supervision and that, across Ontario, the ultimate disposition in 34.9% of sexual abuse cases was Society supervision. (p.36)

10. The narrow wording of S.30(4) of The Child Welfare Act empowering the judge to attach "terms and conditions relating to the method of supervision" imposes severe constraints on the power of judges to order the abuser out of the home or the family to take treatment. (p.37)

11. Assessments were performed in 47.2% of the sexual abuse cases across Ontario. Often the assessments were of the child, or the parents, alone. The Family Court Clinic policy not to assess for child welfare disposition purposes so long as criminal charges are pending, contributes to delays in Family Court, and inhibits the C.A.S. and the Police from using its facilities for crisis counselling of victims. (p.38)

12. Independent counsel for children are usually appointed only after Court proceedings have been initiated. As only 23.1% of cases in Metropolitan Toronto go to Court, most victims of sexual abuse do not have the benefits of independent representation or the possibility of their own counsel in criminal proceedings. (p.40)

13. Where protection proceedings are commenced, most victims of sexual abuse are present in Family Court for the hearing. The atmosphere of Family Court, the lack of witness rooms, and the delays resulting from lengthy dockets, however, impose great pressure on the child and compound her antipathy to the process. (p.40)

14. Only 51.8% of the 79 incidents of sexual abuse reported to the M.C.A.S. in 1980-1981 were subsequently reported to the Child Abuse Register. The "filtering-out" process by which incidents are not reported occurs at all stages. (p.42)

THE CRIMINAL JUSTICE SYSTEM

15. Occurrences of sexual offences against children reported to the Metropolitan Toronto Police 1977-1980 averaged 520 incidents per year. The actual extent of sexual abuse against children is likely at least three or four times that number. (p.46)

16. Within the decentralized structure of the Metropolitan Toronto Police, Police Officers are assigned to these cases, like any others, at random. (p.48)

17. A victim of sexual abuse may be interviewed by several different Officers over a period of several hours. Metropolitan Toronto Police have no special resources available at present to facilitate communication with children. Young children are generally assumed to be incapable of testifying. Use of the "public mischief" caution sometimes deters a complainant from pursuing her case. (p.49)

18. The extent of Police investigations depends on the sophistication of individual Officers. Incest, carnal knowledge and indecent assault cases appear to be dealt with rather summarily. In a disturbing number of cases, a denial by the accused (and the mother or step-mother) ends the investigation. Sometimes, the Police do not interview an identified suspect. (p.51)

19. In 32% of the 153 cases in our sample, an admission by the accused on arrest was noted on the record. (p.52)

20. A medical examination of the victim was indicated in 37.2% of the cases. These occur routinely (85.1%) only in rape cases. Where samples are taken, there is often a lengthy delay in securing the forensic reports. (p.55)

21. Charges were laid in 69 out of the 153 occurrences in our sample (45%). Charges were laid in 33.3% of the incest cases, and 76.4% of the sexual intercourse under 14 years cases. As between assailants who were family and caretakers of the victim and those who were friends and acquaintances, there is a relatively equal percentage of charges laid. (p.56)

22. The principal factors considered in not laying charges were the wishes of the victim and the family not to proceed, problems with corroboration, and concerns about the credibility of the victim. Other factors included the competency of the child to testify, the existence of a separation or divorce dispute, and the promise of the accused to secure treatment. (p.59)

23. Charges are generally not laid for the Provincial offence of inflicting abuse upon a child or permitting the child to suffer abuse (S.47(2) of The Child Welfare Act). (p.63)

24. When charges are laid, the accused is generally held for a "show cause" or "bail hearing". The "no contact" conditions often included in an order for interim release are difficult to enforce, and are frequently deleted or waived. (p.65)

25. A summary offence proceeds in Provincial Court (Criminal Division). An accused charged with an indictable offence has a choice whether to proceed in Provincial Court or elect trial at County Court. In 32 of 52 cases in our sample (61.5%), the case remained at the Provincial Court level. 43.7% of those cases were completed within 90 days. If the case proceeds to County Court, there could be a delay of one to two years before final disposition. (p.67)

26. Victims/witnesses are frequently subpoenaed to Court when they are not needed. Psychologically geared-up for one proceeding, they are most let down when another occurs or when the matter is adjourned. (p.69)

27. Provincial Criminal Courts have no facilities for children who are witnesses. The delays imposed by lengthy Court dockets add to the anxiety of the child. (p.70)

28. Crown Attorneys are assigned to sexual abuse cases, like any others, at random. A specialized rape team designated three years ago broke down for lack of adequate staffing. (p.71)

29. The existing "vertical prosecution" policy for sexual assault cases is only partially implemented. (p.71)

30. Crown Attorneys vary dramatically in how they prepare the victim for Court. Some see the complainant for the first time in the hour before Court. (p.72)

31. At present, the prime support for the child comes from the Police Officers with whom she has established an initial rapport. There is a consensus that the role is essential, but that it should be performed by someone other than the Police. (p.74)

32. Independent counsel for the child are beginning to be used as victim/witness advocates in criminal proceedings. As yet, this role is not clearly defined. (p.75)

33. Our sample did not indicate to what extent victims are actually required to testify in Court. Usually, the child is the only Crown witness at the preliminary hearing. Full trials in incest cases are rare. (p.78)

34. In Canada, determining the capacity of the child to testify is the responsibility of the judge. Difficulties arise at present with respect to very young children and mentally-retarded children. (p.79)

35. Use of anatomically-correct dolls, videotapes, and expert witnesses in the "sexually abused child syndrome" has not yet occurred in Metropolitan Toronto Courts. (p.80)

36. Defence counsel are skeptical about the use of the criminal justice system for "social service objectives". (p.82)

37. The threat of forcing the child to testify is used as leverage by both the Crown and defence counsel in plea discussions. (p.83)

38. There is no consistent policy among Crowns with respect to plea discussions. Some take a plea for common assault in lieu of a charge on a sexual offence; others do not. Some discuss the plea with the Police and the non-offending parent; others do not adhere to this practice. (p.84)

39. Convictions on one charge or another were secured against 48 of 63 traceable adult defendants in our sample. This represents a conviction rate of 76.1% of those charged. Guilty pleas were entered by 33 defendants (52.3%). There is a tendency to take a plea or secure a conviction on a lesser charge than that originally laid. (p.84)

40. In only 18 of the successful prosecutions (37.5%) was a jail term imposed. Jail terms ranged from one day to two and a half years. (p.87)

41. Increasingly, inadequate sentences imposed at trial are being appealed by the Crown. Courts of Appeal are tending to prison terms of three to five years for cases of incest. (p.87)

42. Canadian criminal law does not permit a sentence, once imposed, to be suspended. Under The Provincial Offences Act, a jail term can be delayed thirty days to allow an offender time to arrange his affairs. (p.89)

43. A probation order up to three years is a customary part of most dispositions. (p.90)

44. Probation Officers are generally assigned to their cases at random. As yet, there is only one Probation Officer in one local office who is a specialist in sexual offences. (p.90)

45. The enforcement of probation orders is problematic. Heavy caseloads make minimal supervision inevitable. Treatment orders are difficult to enforce when judges decline to name a specific program, and when treatment facilities "drop" an unmotivated or resistant client. (p.91)

46. The Provincial Injuries Compensation Board makes significant awards to some victims of rape and indecent assault. Most victims of sexual abuse, however, do not apply for compensation. The Official Guardian's Office has received relatively few referrals from Children's Aid Societies in Metropolitan Toronto on behalf of abused children. (p.92)

47. Current legal responses to sexual abuse in Metropolitan Toronto are not adequate. They serve neither the victim nor the community. (p.94)

48. The child welfare and criminal justice systems operate at present in isolation one from the other. What contact that now exists between them is largely dysfunctional. (p.94)

SUMMARY OF RECOMMENDATIONS

The purpose of this paper was to provide a base of information which can be used by the Special Committee on Child Abuse and relevant systems to develop a consistent legal approach to child sexual abuse which, together with initiatives in the areas of prevention, detection and treatment, would lay the basis for a comprehensive community-wide response to the problem. In doing so, a variety of issues have been identified, most of which can be resolved through co-operative policy and procedural changes. Others will require legislative reform.

The following recommendations are those of the author. They are offered to stimulate discussion and action to address the critical concerns which currently impede an appropriate and sensitive response to children who have been sexually abused. All recommendations have been designed to reinforce the general philosophy and approach of the Special Committee, as outlined in the foreword to this paper and also in Appendix L.

The recommendations are contingent upon the active commitment and participation of each relevant system. They assume that the Special Committee will continue to provide the mechanism for discussion, refinement and implementation.

Allocation and Training of Personnel

1. An appropriate number of social workers and counsel from each Children's Aid Society, Officers from each Police Division, and Assistant Crown Attorneys at each Provincial Court should be designated as child sexual abuse specialists.

2. These specialists should be trained together using an integrated, interdisciplinary protocol for processing cases involving sexual abuse of children.

3. The training should also include techniques of interviewing children, the use of anatomically-correct dolls, videotape equipment, innovative forms of corroboration, use of the "sexual abuse indicators" and of expert witnesses in the "sexual abuse syndrome", and appropriate practices in preparing child witnesses. Prevailing myths about the credibility of children and the capacity of young children to testify should be overcome.

4. Provincial Court (Family and Criminal Division) and County Court judges should be educated about the characteristics of the integrated sexual abuse program, trends in the law, and available treatment resources.

5. Training programs should also be initiated for lawyers who provide independent representation for children and for probation and correctional officers.

Identification and Reporting

6. Pending legislative changes, the mandated systems should adopt a common working definition of "sexual abuse". This could be defined as "any sexual intercourse, sexual contact, exhibitionism or sexual exploitation between a child and an adult, including family members and those who are unrelated". The specific acts of sexual abuse could be further defined if necessary. (See Appendix A).

7. Data collection programs of all relevant systems should be re-designed to provide specific information re sexual abuse and to allow for inter-agency tracking of individual cases.

8. All allegations of child sexual abuse, committed by any person, should be reported to the Children's Aid Societies to ensure that all sexually abused children receive adequate protection and support.

9. Child protection services should also be available on request to adolescents who are 16 and 17 years of age and who have been sexually abused.

Investigation

10. All reports of child sexual abuse should be investigated jointly by the Police and Children's Aid Society, with the Police Officer acting as prime investigator in the initial stages of investigation.

11. Interviews of the victim and non-offending family members should be conducted by the Police, in the presence of a Children's Aid Society worker. Consideration should be given to tape-recording these interviews for future use to avoid unnecessary repetition of the child's story.

12. Victims should be exposed to as few interviews as possible. Initial Police contact with the victim should be minimal. Statements should be taken only by specialized Officers, with a C.A.S. specialist present.

13. Special interview rooms, furnished appropriately for young people, should be designated at each Police Division.

14. After the initial investigation, any protection concerns should be pursued by the Children's Aid Society, while the Police alone interview the suspect.

15. The Children's Aid Society, in collaboration with the Police, should take whatever steps are necessary to remove the offender and maintain the child at home.

16. Police should not terminate an investigation without having interviewed an identified suspect.

17. Medical examination of the child should take place immediately only if there is reason to suspect that forensic evidence might be obtained. When samples are taken, there should be no delay in securing test results. Medical examinations primarily for the purpose of reassuring the child (e.g. fear of pregnancy) should be scheduled at her convenience.

18. The Police should re-evaluate the use of the public mischief caution. As a general principle, it should not be given in the early stages of an investigation.

19. In the event that parents or school authorities will not permit Police to interview the child, the Children's Aid Societies should consider an apprehension.

20. The Police and the Children's Aid Societies should collaborate in deciding how individual cases should be handled. There should be joint consultation and mutual disclosure of information prior to laying criminal charges or initiating a protection application. Thereafter, each should keep the other informed of how the case progresses.

Family Court Proceedings

21. All allegations of child sexual abuse within the family should be brought before Family Court, unless special circumstances exist.

22. Where the offender is outside the family (known to the child or not), consideration should also be given to the desirability of protection services or proceedings to ensure adequate support for the child.

23. Independent counsel for all child victims of sexual abuse should be requested prior to the first Court appearance.

24. Sexual abuse cases should be accorded a priority in Family Court. Under no circumstances should an early resolution of child protection concerns be delayed because of parallel criminal proceedings against the offender.

25. The policy of the Family Court Clinic that no assessment is done until criminal charges are resolved, should be discontinued. Other services should also be encouraged to accept children and their families for treatment as soon as possible following disclosure, regardless of pending legal proceedings.

26. Allegations of sexual abuse in protection proceedings should be explicit and any agreed statement of facts should put all the evidence on the record.

27. Pending legislative changes, judges should be encouraged to give a liberal interpretation to S.30(4) of The Child Welfare Act. Where possible, orders for the removal of the offender from the home and for the provision of treatment to the child and her family should be made as conditions of supervision.

28. Witness rooms should be provided at Family Court for the use of victims/witnesses. Courts with vacant space or planning new facilities should give priority to this need.

Provincial Child Abuse Register

29. The Minister of Community and Social Services should be requested to authorize an immediate review of the policies and operation of the Ontario Child Abuse Register.

30. Existing policies preventing the registration of particular types of abusers (e.g. non-caretakers, juveniles, non-family and abusers of teenagers over 16 years of age) should be discontinued.

31. Expungement hearings for abusers should be discontinued. In the interim, under no circumstances should an expungement hearing occur prior to the conclusion of Family or Criminal Court proceedings.

32. If the Register is to be the central depository of all incidents of sexual abuse, its data base should be re-programmed to provide the information required (e.g. geographic location, disposition).

Prosecution of Offenders

33. Criminal charges should be laid whenever possible against all alleged perpetrators of child sexual abuse. The Police should not initially be deterred by a denial by the accused, a lack of physical or medical evidence, an apparent lack of credibility in the victim, the young age of the victim, the attitude of the family, or the existence of a separation or divorce dispute.

34. The Police should consider a continuum of criminal charges. If a criminal charge is not possible, consideration might be given to charges under S.47 (2) of The Child Welfare Act. This charge might also be used against a passive caretaker who by inaction "permits abuse to occur".

35. In addition to collaboration with Children's Aid Societies, the Police should also consult with the Crown Attorney's office in the decision to charge.

36. The prosecution of all child sexual abuse cases should be handled by specialized Assistant Crown Attorneys at each Provincial Court. To this end, the vertical prosecution policy (each case is handled by the same Crown throughout the process) should be strictly observed.

37. These Crowns should be assigned to all sexual abuse cases before the bail hearing. Alternatively, all Crowns in bail court should request "no contact" conditions of bail that would require the accused to live apart from the victim.

38. "No contact" conditions on the accused should be modified only if C.A.S. supervised access can be arranged.

39. Provincial Courts and County Court should accord a priority to sexual abuse cases against children (e.g. no delay, firm schedules). Sexual abuse cases should be scheduled for specific times in a specific Court as the only case on the docket.

40. Provincial Courts should provide a witness room equipped appropriately for children.

41. All child victims should be prepared to testify by the Crown in advance of the hearing.

42. Crowns should develop a consistent policy in plea discussions about sexual abuse cases

    a. To avoid a preliminary hearing and the delay of County Court, efforts should be made to obtain a guilty plea at the Provincial Court level.

    b. On no occasion should a charge on a sexual offence be withdrawn for a plea on common assault.

    c. Crowns should consult with the Police and the non-offending caretaker or C.A.S. before accepting a plea on a lesser charge.

43. The role of the victim/witness advocate should be explored, to provide continuity of support for the child.

44. In the meantime, the role of independent counsel for the child in criminal proceedings should be clarified, and counsel made available to children who do not already have a lawyer in Family Court.

Sentencing

45. Consideration should be given in sentencing to:

    a. the seriousness of the effects of sexual abuse on the victim, and

    b. the desirability of a jail sentence of some duration (preferably under the Temporary Absence Program) combined with long-term probation as the most effective mechanism for rehabilitation of the offender and the family.

46. Probation orders should designate specific treatment programs and extend for the maximum term of three years.

47. The Metropolitan Chairman's Special Committee and the Ministry of the Attorney General should ensure that a liaison is established with Federal and Provincial Corrections Officials, so that day treatment and self-help groups can be integrated into their programs.

48. Specialized Probation Officers to deal with sexual offenders should be designated in each catchment area. To facilitate communications, they should be provided with the initial complaint form for each offender.

49. Treatment facilities and programs which contract to provide therapy for sexual offenders should not "drop" a resistant offender, but should collaborate in the prosecution of those who, by their active or passive conduct, breach the treatment condition of their probation order.

50. A consistent pro-prosecution policy should be adopted re breach of probation by sexual offenders.

Legislative Reform

51. The Metropolitan Chairman's Special Committee should reconstitute and maintain its Legal Advisory Committee with a mandate to review and comment on the following proposals for legislative change.

52. Amendments to The Child Welfare Act of Ontario should be considered to:

    a. provide a statutory definition of "sexual abuse" as proposed in Recommendation 6. Sexual abuse could be defined as "any sexual intercourse, sexual contact, exhibitionism or sexual exploitation between a child and an adult, including family members and those who are unrelated". (Further definitions are outlined in Appendix A);

b. enable abused adolescents of 16 and 17 years of age to qualify for child protection services;

c. provide that "terms and conditions" of a supervision order in S.30(4) are not restricted to the method of supervision;

d. empower Family Court judges to order treatment of the child, family and/or the abuser, and to order that the abuser be restrained from residing in the home of the child;

e. discontinue expungement hearings for abusers; alternatively, provide that no expungement hearing can occur prior to the conclusion of Criminal or Family Court proceedings;

f. provide that the Police have the power to arrest where there are reasonable and probable grounds to believe that an offence under S.47(2) has occurred.

53. Amendments to the Criminal Code of Canada should be considered to:

a. create an offence of "sexual abuse" defined as in 52.a. above (i.e. the provisions on sexual exploitation of young persons proposed by Bill C-53 (see Appendix B) should be defined in terms of "sexual abuse");

b. expand the definition of incest in S.150 to prohibit "deviate sexual conduct" and to include step-parent and adoptive relationships, guardians with wards and persons in loco parentis with their charges.

c. amend Bill C-127 (see Appendix C) to

   i. permit the admission of out of Court statements (recent complaint evidence) of children who are victims of sexual abuse, incest or sexual assault (S.246.5);

   ii. reinstate the burden of proof on an accused re defences to the offence of sexual intercourse with a female 14-16 years of age (i.e. reinstate S.139(3)(4)).

d. repeal S.586 so that corroboration "in a material particular by evidence that implicates the accused" is not required for the unsworn evidence of children.

54. Amendments to the Canada Evidence Act and the Ontario Evidence Act should be considered to provide that:

a. every child in a sexual abuse, sexual assault or incest case should be considered a competent witness and should be allowed to testify, permitting the trier of fact to determine the weight and credibility of the testimony (S.96,97 and

S.125(2)(a) of the proposed Uniform Evidence Act should be amended accordingly);

b. the spouse of an accused should be a competent and compellable witness against the accused where the offence charged is against a person under the age of sixteen years.

55. Amendments to Ontario legislation (perhaps in The Children's Law Reform Act) should be considered to end the "legal limbo" of teenagers 16 and 17 years of age, and accord them independent legal status.

56. Further legal research should be undertaken to explore Canadian law relevant to:

a. new techniques of corroboration;

b. new techniques for proving competence of children;

c. evidentiary theories for admitting the out-of-Court statements of a child;

d. the use of anatomically-correct dolls in Court;

e. the use of videotape in pre-trial and Court proceedings;

f. the use of expert witnesses in the "sexual abuse syndrome" and child development.

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APPENDIX A

American Bar Association, National Legal Resource Centre for Child Advocacy and Protection, DRAFT Recommendations for Improving Legal Intervention in Intra-family Child Sexual Abuse Cases, May 1982,pp.11-12.

1. "Sexual intercourse" means:

   (a) any penetration, however slight, of the vagina by the penis, whether or not there is the emission of semen;

   (b) any sexual contact between the genitals of one person and the mouth, tongue, hand or anus of another person;

   (c) any intrusion into the genitals or anal openings of the victim's or perpetrator's body, including the use of any object for this purpose, EXCEPT that, it shall not include acts for a valid medical purpose.

2. "Sexual contact" means the intentional touching of the genitals or intimate parts, or the clothing covering them (including the breasts, genital area, groin, inner thighs and buttocks), of either the child or the perpetrator, EXCEPT that, it shall not include:

   (a) acts which may reasonably be construed to be expressive of normal familial or friendly affection; or

   (b) acts for a valid medical purpose.

3. "Exhibitionism" means:

   (a) the masturbation of the perpetrator's genitals in the presence of a child;

   (b) the intentional exposure of the perpetrator's genitals in the presence of a child, if such exposure is for the purpose of sexual arousal or gratification, aggression, degradation, or other similar purpose;

   (c) any other sexual act perpetrated for the purpose of sexual arousal or gratification, aggression, degradation, or other similar purpose, in the presence of a child.

4. "Sexual exploitation" means allowing, encouraging or forcing a child to:

   (a) solicit for or engage in prostitution;

   (b) engage in the filming, photographing, videotaping, posing, modelling, or performing before a live audience, where it involves exhibitionism of the child's genitals or any sexual act involving the child as defined in subsections 1-3 of this recommendation.

Amendment proposed by the Minister of Justice on Bill C-53, June 1982.

PART III.1
OFFENCES AGAINST YOUNG PERSONS

Interpretation

138. In this Part,

"guardian" includes any person who has in law or in fact the custody or control of another person;

"sexually explicit conduct" includes any touching of a sexual nature and any live sexual performance;

"sexual exploitation", in relation to a young person, includes all sexually explicit conduct of the young person, whether engaged in alone or with any other person, in the presence or perception of others;

"visual representation" includes any representation that can be seen by any means, whether or not it involves the use of any special apparatus.

Sexual Exploitation of Young Persons

139. (1) Every one who engages in or procures the sexual exploitation of a person who

(a) is not his spouse, and

(b) is under the age of fourteen years,

is guilty of an indictable offence and is liable to imprisonment for fourteen years.

(2) No one shall be found guilty of the offence of engaging in the sexual exploitation of a person under subsection (1) if he establishes that

(a) at the time the sexual exploitation took place, he was under fourteen years of age; or

(b) he is less than three years older than the complainant.

140. (1) Every one who engages in or procures the sexual exploitation of a person who

(a) is not his spouse, and

(b) is fourteen years of age or more and is under the age of sixteen years,

is guilty of an indictable offence and is liable to imprisonment for ten years.

(2) No one shall be found guilty of the offence of engaging in the sexual exploitation of a person under subsection (1) if he establishes that

(a) at the time the sexual exploitation took place he was under sixteen years of age; or

(b) he is less than three years older than the complainant.

141. Every one who, being the parent or guardian or having the lawful care or charge of or exercising authority over a person under eighteen years of age, engages in or procures the sexual exploitation of that person is guilty of an indictable offence and is liable to imprisonment for fourteen years.

142. (1) Every one who, being the owner, occupier or manager of premises, knowingly permits the premises to be used for the purposes of the sexual exploitation of a person under sixteen years of age is guilty of an indictable offence and is liable to imprisonment for five years.

(2) No one shall be found guilty of an offence under this section if he establishes that he believed on reasonable grounds at the time the sexual exploitation took place that the complainant was sixteen years of age or more.

General

149. For the purpose of proceedings in respect of an offence under this Part, unless expressly provided otherwise in relation to any offence, it is not a defence to any charge that

(a) the complainant consented to any conduct of the accused;

(b) the accused reasonably believed, at the time the conduct was complained of took place, that the complainant had attained an age exceeding the age in relation to which the conduct was punishable; or

(c) a young person referred to in sections 144 to 147 consented to or suggested any conduct of the accused.

150. In proceedings in respect of an offence under this Part,

(a) no evidence shall be adduced by or on behalf of the accused concerning the sexual activity of the complainant with any person;

(b) evidence of reputation, whether general or specific, is not admissible for the purpose of challenging or supporting the credibility of the complainant; and

(c) no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration.

C-127

First Session, Thirty-second Parliament,
29-30-31 Elizabeth II, 1980-81-82

THE HOUSE OF COMMONS OF CANADA

BILL C-127

An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof

---

AS PASSED BY THE HOUSE OF COMMONS
AUGUST 4, 1982

25189

5. Sections 139 and 140 of the said Act are repealed and the following substituted therefor:

"**140.** Where an accused is charged with an offence under section 146 in respect of a person under the age of fourteen years, the fact that the person consented to the commission of the offence is not a defence to the charge."

1972, c. 13, ss. 21, 22. 1974-75-76 c. 93, ss. 21, 22

19. Sections 244 to 246 of the said Act are repealed and the following substituted therefor:

Assault

"**244.** (1) A person commits an assault when

(*a*) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;

(*b*) he attempts or threatens, by an act or gesture, to apply force to another person, if he has, or causes that other person to believe upon reasonable grounds that he has, present ability to effect his purpose; or

(*c*) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

Application

(2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

Consent

(3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of

(*a*) the application of force to the complainant or to a person other than the complainant;

(*b*) threats or fear of the application of force to the complainant or to a person other than the complainant;

(*c*) fraud; or

(*d*) the exercise of authority.

Accused's belief as to consent

(4) Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

Assault

245. Every one who commits an assault is guilty of

(*a*) an indictable offence and is liable to imprisonment for five years; or

(*b*) an offence punishable on summary conviction.

Assault with a weapon or causing bodily harm

245.1 (1) Every one who, in committing an assault,

(*a*) carries, uses or threatens to use a weapon or an imitation thereof, or

(*b*) causes bodily harm to the complainant,

is guilty of an indictable offence and is liable to imprisonment for ten years.

Definition of "bodily harm"

(2) For the purposes of this section and sections 245.3 and 246.2, "bodily harm" means any hurt or injury to the complainant that interferes with his or her health or comfort and that is more than merely transient or trifling in nature.

Aggravated assault

245.2 (1) Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.

Punishment

(2) Every one who commits an aggravated assault is guilty of an indictable offence and is liable to imprisonment for fourteen years.

Unlawfully causing bodily harm

245.3 Every one who unlawfully causes bodily harm to any person is guilty of an indictable offence and is liable to imprisonment for ten years.

Assaulting a peace officer

246. (1) Every one commits an offence who

(*a*) assaults a public officer or peace officer engaged in the execution of his duty or a person acting in aid of such an officer;

(*b*) assaults a person with intent to resist or prevent the lawful arrest or detention of himself or another person; or

(*c*) assaults a person

(i) who is engaged in the lawful execution of a process against lands or goods or in making a lawful distress or seizure, or

(ii) with intent to rescue anything taken under lawful process, distress or seizure.

Punishment

(2) Every one who commits an offence under subsection (1) is guilty of

(*a*) an indictable offence and is liable to imprisonment for five years; or

(*b*) an offence punishable on summary conviction.

Sexual assault

246.1 (1) Every one who commits a sexual assault is guilty of

(*a*) an indictable offence and is liable to imprisonment for ten years; or

(*b*) an offence punishable on summary conviction.

No defence

(2) Where an accused is charged with an offence under subsection (1) or section 246.2 or 246.3 in respect of a person under the age of fourteen years, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge unless the accused is less than three years older than the complainant.

Sexual assault with a weapon, threats to a third party or causing bodily harm

246.2 Every one who, in committing a sexual assault,

(*a*) carries, uses or threatens to use a weapon or an imitation thereof,

(*b*) threatens to cause bodily harm to a person other than the complainant,

(*c*) causes bodily harm to the complainant, or

(*d*) is a party to the offence with any other person,

is guilty of an indictable offence and is liable to imprisonment for fourteen years.

Aggravated sexual assault

246.3 (1) Every one commits an aggravated sexual assault who, in committing a sexual assault, wounds, maims, disfigures or endangers the life of the complainant.

Punishment

(2) Every one who commits an aggravated sexual assault is guilty of an indictable offence and is liable to imprisonment for life.

Corroboration not required

246.4 Where an accused is charged with an offence under section 150 (incest), 157 (gross indecency), 246.1 (sexual assault), 246.2 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 246.3 (aggravated sexual assault), no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration.

Rules respecting recent complaint abrogated

246.5 The rules relating to evidence of recent complaint in sexual assault cases are hereby abrogated.

No evidence concerning sexual activity

246.6 (1) In proceedings in respect of an offence under section 246.1, 246.2 or 246.3, no evidence shall be adduced by or on behalf of the accused concerning the sexual activity of the complainant with any person other than the accused unless

(*a*) it is evidence that rebuts evidence of the complainant's sexual activity or absence thereof that was previously adduced by the prosecution;

(*b*) it is evidence of specific instances of the complainant's sexual activity tending to establish the identity of the person who had sexual contact with the complainant on the occasion set out in the charge; or

(*c*) it is evidence of sexual activity that took place on the same occasion as the sexual activity that forms the subject-matter of the charge, where that evidence relates to the consent that the accused alleges he believed was given by the complainant.

Notice

(2) No evidence is admissible under paragraph (1)(*c*) unless

(*a*) reasonable notice in writing has been given to the prosecutor by or on behalf of the accused of his intention to adduce the evidence together with particulars of the evidence sought to be adduced; and

(*b*) a copy of the notice has been filed with the clerk of the court.

Hearing

(3) No evidence is admissible under subsection (1) unless the judge, magistrate or justice, after holding a hearing in which the jury and the members of the public are excluded and in which the complainant is not a compellable witness, is satisfied that the requirements of this section are met.

Publication prohibited

(4) The notice given under subsection (2) and the evidence taken, the information given or the representations made at a hearing referred to in subsection (3) shall not be published in any newspaper or broadcast.

Offence

(5) Every one who, without lawful excuse the proof of which lies upon him, contravenes subsection (4) is guilty of an offence punishable on summary conviction.

Definition of "newspaper"

(6) In this section, "newspaper" has the same meaning as in section 261.

Reputation evidence

246.7 In proceedings in respect of an offence under section 246.1, 246.2 or 246.3, evidence of sexual reputation, whether general or specific, is not admissible for the purpose of challenging or supporting the credibility of the complainant.

Spouse may be charged

246.8 A husband or wife may be charged with an offence under section 246.1, 246.2 or 246.3 in respect of his or her spouse whether or not the spouses were living together at the time the activity that forms the subject-matter of the charge occurred."

R.S., c. E-10

CANADA EVIDENCE ACT

29. (1) Subsection 4(2) of the *Canada Evidence Act* is repealed and the following substituted therefor:

Idem

"(2) The wife or husband of a person charged with an offence or attempt to commit an offence against section 33 or 34 of the *Juvenile Delinquents Act* or with an offence against any of sections 146, 148, 150 to 155, 157, 166 to 169, 175, 195, 197, 200, 246.1, 246.2, 246.3, 249 to 250.2, 255 to 258 or 289 of the *Criminal Code*, is a competent and compellable witness for the prosecution without the consent of the person charged."

(2) Section 4 of the said Act is further amended by adding thereto, immediately after subsection (3) thereof, the following subsection:

Offences against young persons

"(3.1) The wife or husband of a person charged with an offence against any of sections 203, 204, 218, 219, 220, 222, 223, 245, 245.1, 245.2 or 245.3 of the *Criminal Code* where the complainant or victim is under the age of fourteen years is a competent and compellable witness for the prosecution without the consent of the person charged."

Children's Aid Society of Metropolitan Toronto, Policy Manual 01.07.03-C

Indicators of High Risk Sexual Abuse:

1. Sexual Abuse

Sudden penetration.
Physical injury around erogenous zones may occur.
Child may have torn, stained or bloody underclothing.
Family does not support the sexual activity and moves to protect the child.

2. Incest

It is difficult to predict whether incest will occur, because no visible indicators have yet been identified by the research. Despite this, there are clues. Unlike physical abuse and neglect, there are no environmental factors, but there are certain family characteristics that are relevant, and so these indicators are organized according to child, parent and family; with a section on physical indicators.

(a) Physical Indicators

Experience pain or itching in the genital area.
Has venereal disease (especially with very young children).
May have stained or bloody underclothing which the child may have attempted to hide.
Unexplained pregnancy.

(b) The Child

If one child is especially favoured by one parent, e.g. father gives money and gifts to daughter.
A child behaves inappropriately in a sexual way towards another adult, e.g. a teacher.
Extreme reaction to males, i.e. preoccupation with or avoidance of males.
Depression or low self-esteem.
Hysterical incidents, e.g. uncontrolled crying and screaming at school. This is a good indicator because until the crisis point has been reached, they have been "model children".
Runaway girls - or child expresses wish to live away from home.
Sudden regression, especially in young children.
May have poor peer relations because of deliberate isolation by parents.
May become involved in delinquent behaviour, though previously well-behaved.
Child unwilling to participate in physical activity, e.g. gym class.
Drug use or abuse.

(c) **Parents**

Father

Egocentric.
Immature.
Strict in the family's relations with the outside world.
Timid and passive with outside world.
Jealous of daughter.
Does not participate in family's life, e.g. has his own private room.
Shows hopelessness and anxiety.
May be manipulative with family members.

Mother

She is passive, dependent and infantile.
Poor self-image.
Hostile toward husband but jealous of him if he shows interest in other women.
Cold.
Feels worthless as mother, wife and woman.

(d) **Family**

Absence of marital discord, even though they have problems.
"Model children", i.e. absence of acting-out outside of home.
Presence of sibling rivalry due to parental favours.
Socially isolated.

APPENDIX E

Offences defined by The Criminal Code of Canada (prior to Bill C-127) which could be included in acts of sexual abuse.

S. 143 - Rape
S. 145 - Attempt rape
S. 146(1) - Sexual intercourse with a female under fourteen
S. 146(2) - Sexual intercourse with a female between fourteen and sixteen
S. 148 - Sexual intercourse with feeble-minded or insane
S. 149 - Indecent assault on a female
S. 150 - Incest
S. 151 - Seduction of a female between sixteen and eighteen
S. 152 - Seduction under promise of marriage
S. 153 - Sexual intercourse with step-daughter, etc. or female employee
S. 155 - Buggery
S. 156 - Indecent assault on male
S. 157 - Gross indecency
S. 159 - Production, distribution of obscene matter
S. 166 - Parent or guardian who procures female person to have illicit sexual intercourse or for prostitution
S. 167 - Household which permits defilement
S. 168 - Anyone who, in the home of a child, participates in adultery, sexual immorality, habitual drunkenness, or any other form of vice and thereby endangers the morals of the child
S. 169 - Indecent act
S. 175(1)(d) Loiter near a school ground or playground if previously convicted as a dangerous sexual offender
S. 195 Procuring for illicit sexual intercourse or prostitution
S. 197 Failure to provide necessaties of life
S. 200 - Abandoning a child
S. 244 - Assault
S. 245(1) - Common assault
S. 245(2) - Assault causing bodily harm
S. 248 - Abduction of a female
S. 249 - Abduction of a female under sixteen
S. 250 - Abduction of a child under fourteen
S. 253 - Venereal disease
S. 688 - Finding to be a dangerous offender

CANADA CRIMINAL CODE 1981

RAPE.

143. A male person commits rape when he has sexual intercourse with a female person who is not his wife,

(a) without her consent, or
(b) with her consent if the consent
  (i) is extorted by threats or fear of bodily harm,
  (ii) is obtained by personating her husband, or
  (iii) is obtained by false and fraudulent representations as to the nature and quality of the act.

PUNISHMENT FOR RAPE.

144. Every one who commits rape is guilty of an indictable offence and is liable to imprisonment for life.

ATTEMPT TO COMMIT RAPE.

145. Every one who attempts to commit rape is guilty of an indictable offence and is liable to imprisonment for ten years.

SEXUAL INTERCOURSE WITH FEMALE UNDER FOURTEEN.

146. (1) Every male person who has sexual intercourse with a female person who

(a) is not his wife, and
(b) is under the age of fourteen years,

whether or not he believes that she is fourteen years of age or more, is guilty of an indictable offence and is liable to imprisonment for life.

(2) Every male person who has sexual intercourse with a female person who

(a) is not his wife,
(b) is of previously chaste character, and
(c) is fourteen years of age or more and is under the age of sixteen years,

whether or not he believes that she is sixteen years of age or more, is guilty of an indictable offence and is liable to imprisonment for five years.

(3) Where an accused is charged with an offence under subsection (2), the Court may find the accused not guilty if it is of the opinion that the evidence does not show that, as between the accused and the female person, the accused is more to blame than the female person.

AGE.

147. No male person shall be deemed to commit an offence under section 144, 145, 146 or 150 while he is under the age of fourteen years.

INDECENT ASSAULT ON FEMALE.

149. (1) Every one who indecently assaults a female person is guilty of an indictable offence and is liable to imprisonment for five years.

(2) An accused who is charged with an offence under subsection (1) may be convicted if the evidence establishes that the accused did anything to the female person with her consent that, but for her consent, would have been an indecent assault, if her consent was obtained by false and fraudulent representations as to the nature and quality of the act.

INCEST.

150. (1) Everyone commits incest who, knowing that another person is by blood relationship his or her parent, child, brother, sister, grandparent or grandchild as the case may be, has sexual intercourse with that person.

(2) Everyone who commits incest is guilty of an indictable offence and is liable to imprisonment for fourteen years.

(3) Where a female person is committed of an offence under this section and the Court is satisfied that she committed the offence by reason only that she was under restraint, duress or fear of the person with whom she had the sexual intercourse, the Court is not required to impose any punishment upon her.

(4) In this section, "brother" and "sister", respectively, include half-brother and half-sister.

APPENDIX G

Statistics provided by the Office of The Official Guardian Child Representation Program relating to the 308 cases of sexual molestation completed by lawyers for the child, February 1, 1980 to January 31, 1982.

(a) Sex of Child

Male:	14.9%
Female:	85.1%

(b) Age of Child:

Under 12 months:	2.4%
12 months - 5 years:	11.6%
6 years - 12 years:	31.9%
12 years and over:	54.0%

(c) Marital Status of Parents:

Married:	37.0%
Married but Separated:	23.9%
Married but Divorced:	18.5%
Never Married - Cohabiting:	4.2%
Never Married - not Cohabiting:	7.8%
Deceased:	0.3%

(d) Ultimate Judicial Disposition:

Withdrawal:	14.0%
Crown Wardship with Access:	9.3%
Crown Wardship No Access:	4.8%
Society Wardship:	36.4%
Supervision:	34.9%

(e) Initial C.A.S. Recommendation:

Withdrawal:	13.4%
Crown Wardship with Access:	11.3%
Crown Wardship no Access:	5.7%
Society Wardship:	37.9%
Supervision:	30.7%
No Recommendation:	0.9%

(f) Initial Recommendation of Parents:

Withdrawal:	30.4%
Crown Wardship with Access:	6.0%
Crown Wardship no Acces:	1.8%
Society Wardship:	16.1%
Supervision:	26.3%
No Recommendation:	16.7%

(g) Initial Recommendation of Child's Counsel:

Withdrawal:	13.1%
Crown Wardship with Access:	8.7%
Crown Wardship no Access:	4.5%
Society Wardship:	34.0%
Supervision:	35.8%
No Recommendation:	3.9%

Dynamics of Intra-Family Child Sexual Abuse and Principles of Child Development.

Quoted from Lucy Berliner, Linda Block and Josephine Buckley. "Expert Testimony on the Dynamics of Intra-Family Child Sexual Abuse and Principles of Child Development", in American Bar Association, National Legal Resource Centre for Child Advocacy and Protection. Child Sexual Abuse and the Law, Washington D.C., 2nd edition, February 1982, pp. 171-173.

The following represents a brief description of the basic characteristics of child sexual abuse and relevant principles of child development.

1. Sexual Abuse Dynamics

a. Progression of Abuse

The sexual behaviour usually occurs progressively, sometimes up to full intercourse, over time.

b. Duration of Abuse

Sexual abuse usually occurs over a long period of time usually beginning when the child is pre-adolescent (eight to eleven), and continuing into the teenage years. Children often endure the abuse because of bribes, misrepresentation of morality, affection, threats, parental psychological authority, fear of splitting up the family, hurting their mother, losing affection or being blamed.

c. Lack of Force and Physical Injury

Because of the parent's psychological power over the child, force is often not necessary to accomplish the act; there is, therefore, rarely any physical injury.

d. Time of Disclosure of Abuse

If the child does disclose, there may be a delay between the last sexual incident and disclosure, since disclosure frequently is triggered by other events (often relating to conflicts with parents during adolescence). The delay will also mean there probably is no medical evidence of the sexual abuse.

e. Passive Parent's Role

The passive parent, usually the mother, may unconsciously deny the abuse is occurring, and when it is disclosed, she initially may be ambivalent regarding whether to believe the child or her husband. With treatment, the mother often ultimately supports the child.

f. Offender Characteristics

Father-daughter incest constitutes the largest percentage of reported incest cases, and therefore is described here. The father who molests his daughter may be characterized in a variety of ways including: alienation or social isolation from persons outside the family, poor interpersonal relationships, deepseated feelings of inadequacy, poor impulse control, immediate gratification needs, low self-esteem, preference for prepubescent children, commits acts alone, repeated or compulsive behaviour, and an otherwise law-abiding and superficially adaptive life. Some may be passive or introverted, while others are authoritarian or dominating.

g. Retraction and Inconsistent Statement

The family often pressures the child to retract the story, by, for example, telling her she will split up the family, send her father to jail, and cause her mother to lose financial support. The legal process can also exacerbate the situation and contribute to a child's retraction or refusal to testify. Moreover, the child may have ambivalent feelings toward the abusive parent, which might lead to his or her changing the story initially given at a later date or at trial.

2. Behavioural Indicators of Sexually Abused Child

a. Neurasthenia symptoms with no physiological basis, including fatigue, weakness, headaches, bed-wetting, excessive urination, stomach-aches, ringing in ears, sleeping, vasomotor, memory or concentration disturbances.

b. Clinical depression, possibly leading to suicidal tendencies.

c. Isolation from peers, restricted social activities.

d. Runaway, truancy.

e. Involvement with drugs, alcohol.

f. Drop in academic performance.

g. Pseudo-mature seductive behaviour.

h. Fear of men.

i. Heavy household responsibilities (taken on mother's role).

j. Prostitution, promiscuity.

3. Child Developmental Characteristics

a. Difficulty in talking to strangers or in public, testifying in open Courtroom, due to fear, shyness, embarrassment, etc.

b. Difficulty in understanding abstract concepts, such as time or distance. Time is usually personalized, with reference points such as birthdays, holidays, night or day, etc.

c. Short attention span, and unable to endure long interviews, long waiting periods for Court hearings, etc.

Additional materials from our survey of occurrences of sexual assault against children reported to the Metropolitan Toronto Police 1979.

A. Incest

1. Ages of Victims at Time of Report:

15 years	8
14 years	3
13 years	2
8 years	1
4 years	1

2. Duration of Abuse

Once	3
Several Times	2
1-3 years	4
4+ years	6

B. Sexual Intercourse Under 14 years

1. Ages of Victims at Time of Report

14 years	2
13 years	15
12 years	1
8 years	1

2. Ages of Offenders

14-15 years	1
16-17 years	2
18-20 years	6
21-30 years	1
31+ years	5
Not indicated	2

C. Sexual Intercourse (14-16)

1. Age of Victim at Time of Report

14 years	6
15 years	4

3. Ages of Offenders

16-17 years	2
18-20 years	1
21-30 years	5
31+	2

D. Attempt Rape

1. Ages of Victims at Time of Report

7 years	1
9 years	1
10 years	1
13 years	3
15 years	1

2. Ages of Offenders

16-17 years	2
21-30 years	1
Not clear	4

E. Rape

1. Ages of Victims at time of Report

6-9 years	4
10-11 years	2
12-13 years	7
14 years	6
15 years	10

2. Ages of Offenders

14-15 years	5
16-19 years	2
20-30 years	7
31 years +	2
Unknown	10

F. Indecent Assault Female

1. Ages of Victims at Time of Report

2-5 years	14
6-9 years	23
10-11 years	14
12-13 years	21
14-15 years	14

2. Nature of Assault

Fondling	45
Undressed	17
Masturbation	12
Grabbed on Street	10
Oral sex	9
Exposure	8
Violence	5
Attempted Intercourse	5
Weapon	2
Photographs	1

3. Ages of Offenders

9 years	1
11-12 years	6
13-15 years	16
16-19 years	6
20-29 years	10
30-39 years	15
40-49 years	2
50-59 years	3
60-69 years	3
Unknown	23

METROPOLITAN CHAIRMAN'S SPECIAL COMMITTEE ON CHILD ABUSE

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Family Planning Services, City of Toronto Department of Public Health

Dr. Joan McCausland, Associate Medical Officer of Health, City of North York

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Don Richmond, Deputy Commissioner, Metropolitan Toronto Community Services Department

Herbert A. Sohn, Co-ordinator, Child Abuse Program, Ministry of Community and Social Services

Judge George M. Thomson, Provincial Court (Family Division)

Gordon Wolfe, Executive Director, Jewish Family and Child Service

Bruce J. Young, Counsel, Ministry of the Attorney General

Lorna Grant, Co-ordinator

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* To November 30, 1982.

The Metropolitan Chairman's Special Committee on Child Abuse

DEVELOPING A COMPREHENSIVE RESPONSE TO CHILD SEXUAL ABUSE : A STATEMENT OF PRINCIPLES

The sexual abuse of children is a phenomenon which has only recently gained some measure of public and professional attention. With this attention have come both an increase in the number of reported cases and a recognition of the inadequacies of traditional methods of response.

Given the range of professionals who may be called into action upon disclosure of sexual abuse, it is critical that efforts be co-ordinated. During the past year, the Metropolitan Chairman's Special Committee on Child Abuse has provided an active forum through which relevant issues have been identified, debated and resolved in a collaborative attempt to develop a common understanding of and approach to the problem.

The following principles have emerged through these initial efforts and are designed to provide a framework for a comprehensive response to child sexual abuse. As such, they are not intended to restrict or limit efforts but rather to support attempts to implement a consistent and appropriate response, integrating the best which each responsible system has to offer.

Every situation involving child sexual abuse must be assessed individually to determine the best interests of the child involved. We believe that creative application of the following principles will help to guide us consistently toward that end.

1. **Children reporting sexual abuse should be presumed to be telling the truth and bear no responsibility for their involvement, regardless of time or circumstances.**

   Reliable estimates suggest that one in four girls and one in ten boys will be sexually molested by an adult at some point in their childhood. Up to 80% of these children will know their molester and, half of the time, he will be their natural or substitute father. *

   Translating the experiences of communities with considerable success in responding to this problem, it may be estimated that over 3,000 children are sexually abused each year in Metropolitan Toronto. Yet, in 1980, only 501 sexual offences involving children were reported to the Police, and the Children's Aid Societies forwarded only 75 verified cases of intra-familial child sexual abuse to the Provincial Child Abuse Registry.

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* These general estimates are drawn from the results of five major surveys, conducted between 1940 and 1978 including C. Landis (1940), A. Kinsey (1953), J. Landis (1956), J. Gagnon (1965) and D. Finkelhor (1978). Their findings are also supported by the experiences of the Harborview Sexual Assault Center in Seattle, Washington and the Child Sexual Abuse Treatment Program in San Jose, California which, together, have treated over 10,000 sexually abused children in the past decade. Informal surveys in Canada suggest a similar incidence.

Until recently, effective response to child sexual abuse has been severely hampered by the age-worn myth that children fantasize about sexual encounters with adults. This myth is further complicated by an insidious but equally damaging belief that if, in fact, sexual activity occurs, the child is usually a provocative, if not eager, participant.

Fortunately, adults who were molested as children and experienced professionals are now helping to destroy this ill-conceived and dangerous belief system. Experience clearly demonstrates that children do not lie about sexual abuse. In fact, false denials of sexual abuse are infinitely more common than false reports.

All systems responsible for serving children must recognize the alarming prevalence of sexual abuse and commit themselves to responding, without doubt or delay, if a child comes forward. Without this commitment, the balance of power will remain forever in the hands of those adults who choose to violate the bodies and spirits of children.

2. **The use of a child by an adult for sexual purposes is an abusive and criminal act which should be investigated and prosecuted as such.**

Any form of direct or indirect sexual contact between a child and an adult is exploitive since it is motivated by adult needs and involves a child who, by virtue of age and position, is unable to give consent.

The closer the relationship between the child and the adult, the greater the potential damage is to the child. It appears that, ultimately, it is the abuse of trust and authority, more than the nature of the sexual contact, which causes the most trauma to the child as she matures. For this reason, father-daughter incest must be viewed most seriously, not simply as a "family problem" but also as an abusive situation with potential life-long effects upon the child victim and frequently her siblings.

No adult who molests a child should be exempt, particularly by virtue of family relationship, from accountability for his actions. The sexual abuse of children is a crime which cannot by any measure be tolerated or excused. As such, the community has both the right and obligation to take the necessary steps to protect the child and to ensure that the adult in question is deterred from any further abusive acts.

Criminal prosecution conveys a clear message to the offender that his behaviour is both legally and morally unacceptable; that he, alone, is responsible for the abuse and its consequences; and, that the community is prepared to mobilize its resources to protect children. Finally, it also has the benefit of empowering the child victim who sees that she is believed and can come to understand that the disruption in her family is not her fault but a result of the abuse which was inflicted upon her.

3. **Conviction of offenders, however, is not enough. Without appropriate treatment, the risk of re-offence remains high.**

The causes of child sexual abuse are the subject of much debate and speculation. It is accepted, however, that the adult's disturbance is deeply-rooted and usually beyond voluntary control. It is not surprising, therefore, that offenders who receive no treatment or who attempt to engage in treatment voluntarily are generally undeterred in their behaviour.

One reputable study, for example, indicated that the vast majority of incarcerated sex offenders were known to authorities prior to conviction. Offender treatment specialists in Seattle, Washington report further that less than one per cent of offenders remains in treatment on a voluntary basis. There is no reason to assume that the experience in Metro Toronto is significantly different.

Court-ordered treatment offers the best assurance that treatment will, in fact, occur. This, of course, assumes the continued development of offender treatment services which are willing to accept clients who are, at least initially, involuntary.

The engagement of the offender in treatment also helps to reassure the child victim that the offender, who may also be her father, while being punished is also receiving help for his problem. This assurance is particularly important for a child who may be feeling guilty for "breaking up the family" or "sending daddy away or to jail".

4. **Effective response requires the full co-operation and co-ordination of all systems. Specialization of core personnel is necessary to promote sensitivity, consistency and collaboration.**

Every child who has been sexually abused is the potential subject of an array of professionals, many of whom may have little or no experience or knowledge of the problem. For example, in the space of several days, a child could be interviewed by a teacher, a public health nurse or school social worker, one or more child welfare workers, several Police Officers, plus medical and legal personnel. Faced with the constant re-telling of their stories and, quite possibly, conflicting reactions and advice, it is not surprising that many children retreat into silence or deny the truth of their original report.

Given the critical importance of appropriate and sensitive response to disclosure, specific personnel in each system should be designated and trained co-operatively as child sexual abuse specialists. Together, this core of inter-disciplinary specialists can develop and refine new procedures and techniques to improve and co-ordinate detection, reporting, investigation and Court involvement, as well as crisis support and treatment for the sexually abused child and her family.

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7. **Early detection and prevention provide the ultimate key to ending the destructive consequences of child sexual abuse.**

Given that most sexual abuse begins when a child is between the ages of five and nine, and continues over a period of years, early detection and prevention are critical. At the present time, probably no more than ten per cent of all sexually abused children come to official attention. Most of these are adolescents, many of whom are already exhibiting serious problems as a result of on-going sexual abuse. Successful intervention becomes more problematic as the abuse continues.

The effects of child sexual abuse can reach far into the future. Those children who are believed and supported have the best chance of growing up whole and healthy. Others must engage in a life-long struggle against repeated victimization. Some, tragically, carry the lessons learned in childhood to their own children by becoming abusive parents themselves.

While it is critical that services and support be available for current victims of child sexual abuse, it is equally important that efforts promoting early detection and prevention be encouraged. Possible examples include experiential school programs for young children, public education, parent support programs and continuing research aimed at enhanced understanding of the origins and dynamics of child sexual abuse.

No single individual, agency or system, however, can respond in isolation to child sexual abuse. It is a community problem of alarming and destructive proportions. There must be a collective commitment to work together, with all the compromise, frustration and understanding required, to create a community which refuses to tolerate the sexual abuse of its children.

POOR

QUALITY

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